

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL

BEFORE THE HONORABLE YVONNE GONZALEZ ROGERS, JUDGE

IN RE: LITHIUM ION BATTERIES)
ANTITRUST LITIGATION)

NO. 13-MD-2420 YGR (DMR)

MDL NO. 2420

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OAKLAND, CALIFORNIA

FRIDAY, AUGUST 8, 2014

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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PROCEEDINGS REPORTED BY ELECTRONIC/MECHANICAL STENOGRAPHY;
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1 FRIDAY, AUGUST 8, 2014

9:00 A.M.

2 P R O C E E D I N G S

3 **THE CLERK:** CALLING MDL ACTION 2420, IN RE: LITHIUM
4 ION BATTERY ANTITRUST LITIGATION.

5 **THE COURT:** OKAY.

6 OKAY. AS WE'VE DONE IN THE PAST, WE HAVE A COMPLETE
7 RECORD OF EVERYONE WHO IS APPEARING TODAY. IF YOU DIDN'T SIGN
8 UP, MAKE SURE TO CHECK IN WITH THE CLERK AT THE CONCLUSION OF
9 THE PROCEEDINGS AND WE CAN HAVE A RECORD OF YOUR APPEARANCE.

10 LET'S START WITH THE JOINT MOTION. WHO IS GOING TO --
11 USUAL SUSPECTS.

12 MR. KESSLER?

13 **MR. KESSLER:** AFRAID SO, YOUR HONOR.

14 **THE COURT:** MR. SIMON?

15 **MR. SIMON:** YES, YOUR HONOR.

16 **THE COURT:** FOR THE RECORD, YOUR NAMES.

17 **MR. SIMON:** I DON'T LIKE BEING CALLED A "SUSPECT" IN
18 FEDERAL COURT, THOUGH.

19 (LAUGHTER)

20 **THE COURT:** ALL RIGHT. WE'LL START WITH YOU,
21 MR. KESSLER.

22 **MR. KESSLER:** YOUR HONOR, IF I MAY, I PREPARED A -- A
23 FEW DEMONSTRATIVES TO GO THROUGH IN THE ARGUMENT, AND I HAVE
24 THREE COPIES FOR THE COURT AND -- AND YOUR CLERKS; ONE FOR
25 COUNSEL.

1 WE HAVE SOME OTHERS THAT WE CAN -- WE CAN GIVE OUT AS
2 WELL.

3 (OFF-THE-RECORD DISCUSSION.)

4 **MR. KESSLER:** GOOD MORNING, YOUR HONOR.

5 **THE COURT:** OKAY. YOU MAY PROCEED.

6 **MR. KESSLER:** THANK YOU.

7 YOUR HONOR, THE LAST TIME WE WERE HERE ON THE ILLINOIS
8 BRICK ISSUE, YOUR HONOR DISMISSED THE CASE AND WE BELIEVE GAVE
9 RATHER CLEAR DIRECTIONS FOR WHAT WOULD BE REQUIRED IN ORDER
10 FOR THE PLAINTIFFS TO STATE THEIR STANDING UNDER THE ILLINOIS
11 BRICK DOCTRINE.

12 HAVING COME BACK NOW WITH ANOTHER COMPLAINT AND WITH
13 SUBSTANTIAL AMENDMENTS, WHAT WE FIND, YOUR HONOR, THAT THEY
14 HAVE ONLY FILLED A SMALL PORTION OF THE GAP IN THEIR PLEADINGS
15 FROM THE LAST TIME AND THERE STILL, YOUR HONOR, IS A RATHER
16 CAVERNOUS HOLE IN WHAT WE BELIEVE YOUR HONOR'S DECISION
17 REQUIRES IN ORDER FOR THEM TO QUALIFY.

18 THE -- THE REAL PROBLEM HERE, YOUR HONOR, WE BELIEVE IS
19 THAT WE HAVE ABLE CLASS COUNSEL WHO HAS NOT BEEN ABLE TO FIND
20 THE RIGHT PLAINTIFFS TO STATE A FEDERAL ANTITRUST CLAIM.
21 THESE -- THESE PLAINTIFFS MAY, IN FACT, AT LEAST FROM ILLINOIS
22 BRICK STANDPOINTS, BE ABLE TO AVOID THAT BY STATING INDIRECT
23 CLAIMS, AS OTHERS HAVE DONE, UNDER THE STATE LAWS. BUT
24 THEY'RE NOT THE RIGHT DIRECT PLAINTIFFS.

25 WE CAN THINK OF WHO THE RIGHT DIRECT PLAINTIFFS ARE. ONE

1 GROUP WOULD BE THE PACKERS WHO THERE'S NO DISPUTE THEY SAID IN
2 THEIR BRIEF ARE NOT OWNED OR CONTROLLED, ARE COMPLETELY
3 INDEPENDENT.

4 ANOTHER GROUP WOULD BE COMPANIES LIKE DELL OR HP OR A
5 TELEPHONE MANUFACTURER WHO MAY HAVE BOUGHT THE BATTERIES
6 DIRECTLY FROM ONE OF THE DEFENDANTS AND WHO KNOWS THE CHAIN OF
7 CONTROL FOR THE CELLS, AND THEY MIGHT BE THERE. BUT THEY
8 DON'T HAVE ANY OF THOSE CORRECT DIRECT PLAINTIFFS.

9 **THE COURT:** I WANT TO INTERRUPT YOU JUST FOR A SECOND
10 BECAUSE IN YOUR LAST STATEMENT, YOU USED TWO WORDS. YOU USED
11 "BATTERIES" AND YOU USED "CELLS, "AND I WANT TO MAKE SURE THAT
12 WHEN YOU'RE MAKING YOUR ARGUMENT, WHEN ALL OF YOU ARE MAKE
13 YOUR ARGUMENT, YOU'RE MAKING DISTINCTIONS BETWEEN THE THREE
14 LEVELS THAT WE HAVE.

15 THE CELLS -- IF YOU WANT TO REFER TO "CELLS" SAY "CELLS."
16 IF YOU WANT TO REFER TO THE BATTERIES OR THE PACKS, THEN SAY
17 "BATTERIES."

18 **MR. KESSLER:** THANK YOU, YOUR HONOR.

19 **THE COURT:** AND "PRODUCTS" BEING THE LAST, BECAUSE
20 THE ANALYSIS IS DIFFERENT, AT LEAST FROM YOUR VANTAGE POINT
21 WITH RESPECT TO THE CELLS AND THE BATTERIES.

22 **MR. KESSLER:** ABSOLUTELY, YOUR HONOR.

23 SO STARTING TALKING ABOUT THE CELLS, OBVIOUSLY EVERY
24 COMPANY WHO PURCHASED A CELL DIRECTLY, WHICH IS THE ALLEGEDLY
25 PRICE-FIXED PRODUCT, KNOWS WHO THEY ARE, COULD STATE THAT, AND

1 THEY WOULD BE CORRECT DIRECT PLAINTIFFS.

2 WHAT I WAS ALLUDING TO ABOUT BUYING A BATTERY IS THAT
3 THERE COULD BE THEORETICALLY AN OWNERSHIP OR CONTROL SITUATION
4 WHERE A COMPANY LIKE DELL MAY KNOW THAT IT BOUGHT A PACKED
5 BATTERY FROM ONE OF THE DEFENDANTS WHERE NO INTERMEDIARY WAS
6 USED SO THAT THERE WOULD BE AN OWNERSHIP OR CONTROL SITUATION
7 FOR THAT COMPANY AND THEY'D BE ABLE TO PLEAD FACTS SAYING, "I
8 BOUGHT THIS FROM PANASONIC CORPORATION WHO PACKED THE CELLS
9 ITSELF AND SOLD IT TO ME."

10 AND SO IT'S POSSIBLE YOU COULD HAVE A DIRECT PLAINTIFF WHO
11 WOULD BE ABLE TO PLEAD THE REQUIRED FACTS UNDER TWOMBLY AND
12 UNDER ILLINOIS BRICK. SO THE -- THE PROBLEM HERE -- AND NOW
13 I'M GOING THROUGH THIS IS -- IS WHERE THE GAP IS.

14 AND, YOUR HONOR, IF YOU LOOK AT THE -- THE DEMONSTRATIVES
15 WE PUT OUT, SO THE FIRST DEMONSTRATIVE IS SIMPLY POINTING OUT
16 THAT ONCE AGAIN, THE ONLY ISSUE IS OWNERSHIP AND CONTROL. IN
17 OTHER WORDS, THEY -- IT'S NOW CONCEDED THAT THEY ARE INDIRECT.
18 IT IS CONCEDED THEY MUST HAVE ONE OF THE THREE EXCEPTIONS, AND
19 IT'S CONCEDED THE ONLY EXCEPTION THEY ARE ARGUING FOR IS
20 OWNERSHIP AND CONTROL. AND WE JUST PUT THE CITATIONS AS TO
21 WHERE THAT IS.

22 AND -- SO WE'RE TALKING SOLELY ABOUT OWNERSHIP OR CONTROL.

23 **THE COURT:** AND THAT'S CORRECT, RIGHT, MR. SIMON?

24 **MR. SIMON:** THAT'S CORRECT, YOUR HONOR, WITH ONE
25 CAVEAT.

1 WHEN MR. KESSLER SAYS VERY BROAD STATEMENTS LIKE CONCEDED
2 WE'RE INDIRECT, I WOULD REFER THE COURT TO, AND MR. KESSLER,
3 WHAT JUDGE SEEBORG SAID AND JUDGE CONTI SAID ABOUT THAT, WHICH
4 IS IT'S A MATTER OF NOMENCLATURE. WE ARE THE DIRECT
5 PURCHASERS IN THE CASE BY VIRTUE OF THE ROYAL PRINTING
6 EXCEPTION. AND THE FACT THAT THEY'RE TRYING TO CALL US
7 INDIRECT BECAUSE WE'RE OPERATING UNDER THE EXCEPTION IS WRONG.

8 SO HE'S -- CAN KEEP SAYING "INDIRECT," BUT WE ARE
9 OPERATING AS THE DIRECT PURCHASERS BECAUSE NOBODY ABOVE US
10 WILL BRING A LAWSUIT 'CAUSE THEY'RE ALL AFFILIATED WITH THE
11 DEFENDANTS.

12 **MR. KESSLER:** ACTUALLY, YOUR HONOR, THIS COURT HAS
13 FOUND THAT THEY'RE INDIRECT IN YOUR LAST OPINION QUOTING FROM
14 AMONG, OTHER THINGS, ATM AND OTHERS. SO I BELIEVE THE ISSUE
15 IS THEY'RE INDIRECT.

16 **THE COURT:** BUT IT IS --

17 **MR. KESSLER:** -- HAVE AN EXCEPTION.

18 **THE COURT:** IT IS JUST AN ISSUE OF TERMINOLOGY. I
19 THINK WE ALL UNDERSTAND WHAT THE FACTUAL CIRCUMSTANCES ARE AND
20 WHAT THE STATUS IS OF -- OF THESE INDIVIDUALS.

21 **MR. KESSLER:** YES, YOUR HONOR.

22 **THE COURT:** THE REASON THAT I ASKED MR. SIMON TO
23 RESPOND IS BECAUSE YOU HAVE NOW -- BOTH OF YOU GONE BACK AND
24 FORTH WHEN YOU QUOTE TO ARGUMENTS MADE THAT SAYS, WELL, THEY
25 CONCEDED AT ORAL ARGUMENT, AND THEN THE OTHER SAID SAYS, WELL,

1 NO, WE DIDN'T QUITE CONCEDE AT ORAL ARGUMENT, SO NOW I HAVE IT
2 ON THE RECORD. YOU'VE ASKED -- YOU'VE INDICATED THAT THERE
3 WAS A CONCESSION; MR. SIMON'S INDICATED HIS POSITION.

4 YOU MAY CONTINUE.

5 **MR. KESSLER:** SO, YOUR HONOR, LOOKING AT YOUR HONOR'S
6 OPINION ON PAGE 13 -- AND I -- I WON'T QUOTE BACK TO THE COURT
7 YOUR OWN WORDS -- WHAT WE GET FROM THAT WHERE YOU SAID WHAT
8 THEY MUST PROVE IS THREE THINGS, AS I UNDERSTAND IT. IS THAT,
9 ONE, THERE HAS TO BE OWNERSHIP AND CONTROL THROUGH THE CHAIN
10 OF DISTRIBUTION. IN OTHER WORDS, IT'S NOT SUFFICIENT TO JUST
11 HAVE IT AT THE BOTTOM. IT HAS TO GO UP THROUGH THE TOP FROM
12 THE CELL MANUFACTURERS TRACING IT THROUGH.

13 NUMBER TWO, YOUR HONOR SAID IT CANNOT BE CONCLUSORY
14 ASSERTIONS. THERE HAS TO BE FACTS ALLEGED WHICH THEN
15 PLAUSIBLY SUPPORT THE OWNERSHIP AND CONTROL AT EACH -- AT EACH
16 LEVEL. SO IT'S NOT JUST ENOUGH TO SAY THAT MAYBE IT HAPPENED
17 OR JUST ALLEGE IT WITHOUT ANY FACTS TO DO IT.

18 AND THE THIRD THING IS -- AND I THINK THIS IS VERY
19 IMPORTANT -- IT HAS TO BE THESE PLAINTIFFS. WHAT WE'RE NOT
20 DOING HERE IS -- IS ARGUING WHETHER THERE AREN'T HYPOTHETICAL
21 CLASS MEMBERS WHO MAY, IN FACT, HAVE A CLAIM AND CAN -- OTHERS
22 WHO DON'T HAVE A CLAIM BUT WHO COULD ESTABLISH IT, THE INQUIRY
23 HAS TO BE ONE BY ONE FOR THESE PLAINTIFFS NOW, HAVE THEY
24 ESTABLISHED THEIR ILLINOIS BRICK STANDING 'CAUSE WE DON'T HAVE
25 A CLASS. THIS IS JUST A MOTION TO DISMISS THEIR INDIVIDUAL

1 CLAIMS, SO -- SO THAT'S THE FOCUS OF DOING THIS.

2 AND THE NEXT POINT I WOULD MAKE, YOUR HONOR, IS WHAT
3 CONTROLS IS THE COMPLAINT. AND THE REASON I SAY THAT, AND I'M
4 GOING TO HAVE SOME DEMONSTRATIVES ABOUT THIS, PLAINTIFFS HAVE
5 TAKEN LIBERTY IN THEIR BRIEF OF MAKING SOME BROAD STATEMENTS.
6 AND THEN WHEN YOU GO BACK AND LOOK AT THE ACTUAL COMPLAINT
7 ALLEGATIONS, WHICH, OF COURSE, IS WHAT CONTROLS, THEY ARE NOT
8 NEARLY AS BROAD AS THE STATEMENTS IN THE -- IN THE BRIEFS.

9 SO WHAT I'M GOING TO FOCUS ON IS WHAT IS IT EXACTLY THAT
10 THEY ALLEGE PLAINTIFF BY PLAINTIFF AND DOES IT FILL THE
11 OWNERSHIP AND CONTROL GAP WITH PLAUSIBLE FACTS TO DO THAT AND
12 WE BELIEVE IT DOES NOT.

13 THE NEXT DEMONSTRATIVE I'D LIKE TO CALL YOUR HONOR'S
14 ATTENTION TO IS NO. 2. AND WHAT THIS IS DOING IS GOING
15 THROUGH THE CASES, ILLUSTRATING WHAT THE PROBLEM IS HERE
16 BECAUSE I THINK THE CASES ARE VERY HELPFUL.

17 SO IN ROYAL PRINTING, IT'S VERY IMPORTANT NOT JUST FOR
18 WHERE ROYAL PRINTING SAID THERE WAS THE ILLINOIS BRICK
19 EXCEPTION BUT FOR WHERE ROYAL PRINTING SAID THERE WASN'T THE
20 ILLINOIS BRICK EXCEPTION, 'CAUSE IT DID NOT FIND ILLINOIS
21 BRICK STANDING FOR ALL OF THE SALES THAT WERE ALLEGED IN THAT
22 CASE. THE CHAIN THAT WAS BROKEN, YOUR HONOR, IS -- WAS NOT
23 FOUND TO BE ILLINOIS BRICK AND ROYAL PRINTING WAS THE ONE ON
24 THE RIGHT WHERE THERE WERE THIRD-PARTY SELLERS WHO BOUGHT THE
25 PRICE-FIXED PAPER AND THEN DID SOMETHING WITH IT AND THEN

1 MOVED IT ON.

2 OKAY. THAT IS GOING TO BE THE EQUIVALENT OF THE
3 INDEPENDENT PACKERS OR THE CONTRACTORS IN OUR CASE, AS WE'RE
4 GOING TO SEE AND WHAT -- AND WHAT THE PROBLEM IS ABOUT THAT.
5 SO WE THINK THAT THAT'S VERY IMPORTANT.

6 SIMILARLY, IN ODD, WHICH IS THE NEXT CHART HERE, THERE
7 WERE TWO TYPES OF PLAINTIFFS WERE FOUND TO HAVE ILLINOIS BRICK
8 STANDING. ONE ON THE LEFT WERE THOSE WHO DIRECTLY PURCHASED
9 IT FROM THE DEFENDANTS. AND THE ONE ON -- ONE OVER IN THE
10 MIDDLE WAS THE ONE WHO PREFERRED (SIC) IT FROM DEFENDANT-OWNED
11 OR CONTROLLED SELLERS OF THE PRODUCT SO THERE WAS AN UNBROKEN
12 CHAIN.

13 BUT, AGAIN, THE ONE IN ODD THAT WAS REJECTED WAS MADE BY
14 THIRD-PARTY MANUFACTURERS. AND THE DIFFERENCE IN THOSE CASES
15 WERE THEY WERE ABLE TO ALLEGE WHICH WAS WHICH, AND THAT'S WHAT
16 I'M GOING TO COME DOWN TO HERE IN A MOMENT.

17 SO WE GET NOW TO LITHIUM BATTERIES, WHICH IS WHERE ARE WE
18 NOW. AND WHAT WE'RE GOING TO FIND, YOUR HONOR, IS THAT LAST
19 TIME THERE WERE HOLES IN THE BOTTOM OF THE CHAIN IN ADDITION
20 TO THE TOP, 'CAUSE THIS LAST TIME, THEY DID NOT ALLEGE WHO DID
21 THEY BUY FROM, WHAT PRODUCTS DID THEY BUY -- IN OTHER WORDS,
22 YOU -- YOU COULDN'T TELL ANYTHING. THEY DIDN'T -- OTHER THAN
23 A CONCLUSORY ASSERTION THAT THEY BOUGHT FROM DEFENDANTS, THERE
24 WERE NO DETAILS.

25 SO THEY'VE GONE BACK AND THEY FILLED IN THE BOTTOM RUNG OF

1 THE CHAIN, AND WE'RE NOT CONTESTING THE BOTTOM RUNG AT LEAST
2 FOR THE ONES WHERE THEY'VE IDENTIFIED THE WHOLLY OWNED
3 COMPANY, SO THEY -- THEY'VE ALLEGED PANASONIC, SONY, SANYO, A
4 FEW WHERE THEY SAY THEY BOUGHT FROM IT A WHOLLY OWNED COMPANY.
5 FOR THOSE, AT LEAST, WE'RE NOT CONTESTING THE BOTTOM OF THE
6 CHAIN.

7 I WOULD NOTE THEY STILL ALLEGE SOME, LIKE FROM HITACHI
8 MAXELL AND FROM SAMSUNG, WHICH ARE NOT ANY OWNERSHIP AND
9 CONTROL ALLEGATIONS MADE. SO THEY HAVE SOME HOLES DOWN HERE,
10 BUT AT LEAST THEY HAVE SOME PRODUCTS THAT FILL IN THE BOTTOM
11 CHAIN, SO THAT'S NOT REALLY THE MOST IMPORTANT ISSUE IN THIS
12 MOTION.

13 WHAT THE PROBLEM IS, IS THAT THEY HAVEN'T FILLED IN THE
14 TOP PORTIONS OF THE CHAIN TO KNOW IF A PARTICULAR PLAINTIFF
15 BOUGHT A PRODUCT WHICH WAS PACKED BY A THIRD PARTY AND WHAT
16 THE RELATIONSHIP WAS BY THAT THIRD PARTY.

17 AND THIS IS VERY SIGNIFICANT NOW AS WE LOOK AT THE
18 COMPLAINT. AND I WOULD DIRECT YOUR HONOR FIRST TO PARAGRAPH
19 97 OF THE COMPLAINT. IN PARAGRAPH 97, THEY MAKE IT VERY CLEAR
20 FIRST THAT THEY'RE -- THAT THERE WERE STILL THESE THIRD-PARTY
21 PACKERS -- THEY ALLEGE THIS -- FOR ASSEMBLY AND FOR LITHIUM
22 ION BATTERIES, OKAY?

23 AND THEY SAY HERE, THAT THESE TRANSACTIONS TEND TO INVOLVE
24 OUR TRANSFER OF TITLE. YOUR HONOR, I'D START OUT BY SAYING
25 THAT'S A TOTALLY CONCLUSORY ASSERTION. WE DON'T KNOW WHAT

1 "TEND" MEANS, AND THERE'S NO WAY TO KNOW WHETHER ANY
2 PARTICULAR PLAINTIFF WAS IN THE TENDENCY OR OUTSIDE THE
3 TENDENCY, BUT THEY'VE THROWN IN THIS ASSERTION OF "TEND" TO
4 INVOLVE A TRANSFER TITLE. EITHER THEY DID OR THEY DIDN'T, BUT
5 THEY DON'T ALLEGE THE FACTS ONE WAY OR THE OTHER ABOUT THAT.

6 BUT THEN THEY GO BASICALLY THESE PACKERS -- THEY JUST
7 REPEATED THE SAME ALLEGATIONS, THAT THEY'RE DEPENDENT FOR
8 THEIR BUSINESS AND MUST MAINTAIN A CLOSED RELATIONSHIP.

9 YOUR HONOR, THAT'S THE SAME ALLEGATION YOU HELD LAST TIME
10 WAS INSUFFICIENT. SO WE STILL HAVE THIS PACKER ISSUE.

11 NOW, THEY THEN GO ON, YOUR HONOR, IF WE LOOK AT PARAGRAPH
12 99 TO SAY THE FOLLOWING: THEY SAY -- AND THIS IS AT THE END
13 OF THE PARAGRAPH, "DEFENDANTS AND THEIR COCONSPIRATORS, AS
14 HEREIN ALLEGED, FIXED A PRICE OF LITHIUM ION BATTERY CELLS
15 THAT WENT INTO LITHIUM ION BATTERIES" -- SO WE'RE ONLY TALKING
16 ABOUT THE CELLS -- AND LITHIUM ION BATTERIES PURCHASED BY THE
17 PLAINTIFFS IN THE CLASS.

18 THE CLAIMS IN THIS COMPLAINT INCLUDE LITHIUM ION BATTERY
19 CELLS WHICH WERE PACKAGED BY DEFENDANTS AND THEIR
20 COCONSPIRATORS. LITHIUM ION BATTERY CELLS THAT WERE PACKED BY
21 COMPANIES FOR THEIR DEFENDANTS AND THEIR COCONSPIRATORS WHERE
22 TITLE TO SAID CELLS DID NOT TRANSFER AND LITHIUM ION BATTERY
23 CELLS THAT WERE PACKED BY COMPANIES OWNED OR CONTROLLED BY
24 DEFENDANTS AND THEIR COCONSPIRATORS.

25 OKAY. NOW, WHAT'S THE PROBLEM WITH THAT? THE PROBLEM

1 WITH THAT IS WHEN YOU GO BACK TO THE PLAINTIFFS, WE HAVE NO
2 WAY OF KNOWING, THEY MAKE NO ALLEGATIONS TO KNOW WHETHER ANY
3 PLAINTIFF FITS INTO ANY OF THESE THREE CATEGORIES OR NOT.

4 IN OTHER WORDS, THE PLAINTIFFS EACH COULD HAVE PURCHASED A
5 PRODUCT WHICH WENT THROUGH A THIRD-PARTY PACKER WHERE TITLE
6 DID TRANSFER. NOW, THEY'RE SAYING THEY'RE NOT CHALLENGING
7 THAT, BUT THERE'S NO CLAIM, THERE'S NO FACT TO PLAUSIBLY
8 ESTABLISH THAT THEY FIT INTO ONE OF THESE CATEGORIES BECAUSE
9 WHEN YOU LOOK AT THE PLAINTIFF-BY-PLAINTIFF ALLEGATIONS,
10 THERE'S NOTHING ALLEGED TO LET YOU KNOW.

11 SO WHAT THEY'VE DONE IS THEY'VE ESTABLISHED THAT THERE ARE
12 POSSIBLY SOME PLAINTIFFS OUT THERE WHO HAVE CLAIMS UNDER
13 ILLINOIS BRICK. WE AGREE WITH THAT. THAT'S WHAT I SAID AT
14 THE BEGINNING, YOUR HONOR. THERE ARE CLEARLY SOME PLAINTIFFS
15 WHO POSSIBLY HAVE CLAIMS. BUT THEIR BURDEN NOW UNDERSTANDING
16 IS TO SHOW THAT THESE PLAINTIFFS FIT INTO THOSE CATEGORIES,
17 AND THAT'S --

18 **THE COURT:** ARE YOU GOING TO GET TO THE ISSUE WITH
19 RESPECT TO THE SERIAL NUMBERS OR THE STANDARDS THAT ALLOW FOR
20 THE TRACING TO OCCUR, 'CAUSE I DON'T SEE THAT, AT LEAST ON
21 THIS CHART.

22 **MR. KESSLER:** OKAY. THE SERIAL NUMBERS AND THE
23 STANDARDS DON'T SOLVE THE PROBLEM. I'LL EXPLAIN WHY. THEY
24 ALLEGE IN THE CASE ALSO IN THE -- AND I'LL FIND THE EXACT
25 PARAGRAPH IN A SECOND. OKAY.

1 THEY ALLEGE THAT -- LOOK AT PARAGRAPH 96 -- IN PARAGRAPH
2 96, THEY ALLEGE AS FOLLOWS, OKAY? WHEN DEFENDANT OR AN ENTITY
3 ACTING ON THE DEFENDANTS' BEHALF PACKS LITHIUM ION BATTERIES
4 FOR SALE BY THE DEFENDANT -- SO THAT COULD BE A PACKER, A
5 THIRD-PARTY PACKER ACTING ON THE DEFENDANT'S PACK (SIC) -- THE
6 PACKS BEAR MARKING IDENTIFYING THE DEFENDANT AS THE
7 MANUFACTURER.

8 SO WHAT THAT MEANS IS THERE ARE GOING TO BE SITUATIONS
9 WHERE EVEN IF YOU COULD SAY THAT THERE IS A BRAND THAT THE
10 MANUFACTURERS IDENTIFIED AS PANASONIC OR SONY, IF A
11 THIRD-PARTY PACKER WAS INVOLVED AND JUST PUT THAT BRAND ON, AS
12 THEY ALLEGE -- PUTTING THE BRAND ON DOESN'T TELL YOU ANYTHING
13 ABOUT WHEN TITLE MOVED OR NOT, OR WHETHER THERE WAS A SALE.
14 AND REMEMBER, I READ TO YOU THE ALLEGATION. THEY SAID TITLE
15 TENDS TO PASS WHEN YOU'RE DEALING WITH THOSE COMPANIES. SO
16 MERELY KNOWING THE BRAND AND -- DOESN'T HELP YOU.

17 THE OTHER POINT --

18 (SIMULTANEOUS COLLOQUY.)

19 **MR. SIMON:** MAY I MAKE ONE POINT BECAUSE -- IF YOU
20 DON'T, YOUR HONOR, TO RESPOND TO A POINT BECAUSE IT --

21 **THE COURT:** MR. SIMON, WAIT.

22 FINISH UP. AND THEN I'LL MOVE TO YOU.

23 **MR. KESSLER:** OKAY. THANK YOU.

24 THE -- THE STANDARDS, THE UL STANDARDS THEY SAT (SIC) --
25 CITE DON'T SOLVE THIS PROBLEM EITHER, BECAUSE DESPITE WHAT

1 THEY SAID ABOUT THOSE STANDARDS, THEY DO NOT REQUIRE THAT WHEN
2 YOU HAVE A BATTERY PACK, THAT THE INDIVIDUAL CELLS BE MARKED
3 WITH THE BRAND. YOU STILL HAVE THAT PROBLEM. ALL THEY
4 REQUIRE IS FOR PURPOSES OF RECALLING THE BATTERY BECAUSE THERE
5 COULD BE A -- A SAFETY HAZARD THAT YOU KNOW THERE'S A NAME ON
6 THE PACK.

7 AND SO IT'S -- SO IT'S A PROBLEM IN TWO THINGS. ONE, IT
8 DOESN'T INDICATE WHOSE CELLS THEY ARE. AND NUMBER TWO,
9 THERE'S -- NUMBER TWO, EVEN IF YOU KNEW WHOSE CELLS THEY WERE,
10 YOU STILL WOULDN'T KNOW IF THEY CAME THROUGH THIS THIRD-PARTY
11 PACKER WHO PUT THE BRAND NAME OF THE CELL MANUFACTURER ON THEM
12 FOR SOME REASON.

13 THERE'S JUST A FUNDAMENTAL GAP IN THE ALLEGATIONS. AND,
14 IN FACT, OTHER THAN A GENERAL ALLEGATION, THESE TYPES OF
15 GENERAL ALLEGATIONS, THERE IS NO SPECIFIC ALLEGATION FOR ANY
16 PLAINTIFF, ONE BY ONE, THAT MY BATTERY WENT THROUGH THIS
17 CHANNEL THROUGH -- YOU KNOW, THAT AVOIDED THE PACKERS OR WENT
18 THROUGH THE PACKERS AND THERE WAS OWNERSHIP OR CONTROL OR
19 ANYTHING ELSE THAT WOULD ESTABLISH THIS ISSUE.

20 NOW, YOUR HONOR, WHAT --

21 **THE COURT:** HOLD ON, MR. KESSLER.

22 NOW, MR. SIMON.

23 **MR. KESSLER:** YES.

24 **MR. SIMON:** YOUR HONOR, THE PROBLEM WITH WHAT
25 MR. KESSLER IS SAYING IS, AS OFTENTIMES HAPPENS, HE TAKES ONE

1 PARAGRAPH OUT OF CONTEXT. IF YOU LOOK AT PARAGRAPHS 100, 101
2 AND 102, WE SPECIFICALLY ALLEGE HOW YOU CAN TRACE THESE
3 DISTINCT COMPONENTS BACK TO THE MANUFACTURERS, NOT ONLY OF
4 BATTERIES BUT THE CELLS. AND IF I MAY HAND YOU UP OUR
5 POWERPOINT -- I HAVE TWO -- I CAN GIVE YOU THREE IF NECESSARY.
6 AND I'LL REFER YOU TO A COUPLE SLIDES BECAUSE THIS IS REALLY
7 THE IMPORTANT POINT.

8 **THE COURT:** HOLD ON. I NEED ONE MORE OF THOSE.

9 **MR. SIMON:** ONE MORE?

10 (PAUSE IN THE PROCEEDINGS.)

11 **THE COURT:** OKAY. WHAT PAGE?

12 **MR. SIMON:** AND IF I COULD DIRECT TO YOU PAGE 11 AND
13 12 OF THE POWERPOINT, AND, YOU KNOW, THE STANDARD THAT
14 MR. KESSLER IS TRYING TO HOLD US TO DOESN'T EVEN COMPORT WITH
15 YOUR HONOR'S ORDER THAT WE DON'T HAVE TO ESTABLISH EVERY LINK
16 IN THE CHAIN. IT'S NEVER BEEN REQUIRED BY ANY COURT IN THE
17 DISTRICT THAT SUCH HAS TO HAPPEN.

18 WE'VE GIVEN YOU PLAUSIBLE INFERENCES, AND THIS -- THESE
19 TWO PICTURES GIVE YOU ALL THE PLAUSIBLE INFERENCES YOU NEED TO
20 KNOW ABOUT THE TRACEABILITY OF THESE PRODUCTS, NOT ONLY FROM
21 THE BATTERY BUT TO THE CELL BACK TO THESE DEFENDANTS.

22 THE FIRST PICTURE ON PAGE 11 IS A LAPTOP BATTERY. AND AS
23 YOU CAN SEE, THE CELLS THAT GO INTO THAT LAPTOP BATTERY BEAR
24 THE NAME "SONY" ON IT. IT, IN FACT, IS A SONY LAPTOP BATTERY.
25 YOU SEE THAT INFORMATION ON THE CELLS THEMSELVES.

1 NOW, MR. KESSLER'S POINT IS SIMPLY THAT YOU CAN'T TELL ME
2 THAT A SONY LAPTOP BATTERY HAS -- DOESN'T HAVE A THIRD-PARTY
3 PACKER'S CELLS IN IT. FIRST OF ALL, IF IT HAS A THIRD-PARTY
4 PACKER'S CELLS, WE ARE NOT CLAIMING IT. IT IS VERY CLEAR.

5 MORE IMPORTANTLY, THERE IS NO ALLEGATION COMPLAINT, NO
6 EVIDENCE OTHER THAN MR. KESSLER'S SPECULATION THAT A SITUATION
7 OCCURS WHERE A THIRD PARTY WHO ALWAYS PUT THEIR NAMES ON THEIR
8 OWN BATTERIES AFTER THEY PACK THEM ACTUALLY DID THIS FOR SONY.
9 AND HIS SPECULATION SHOULD NOT MAKE US GET DISMISSED IN THE
10 CASE, 'CAUSE THAT'S ALL IT IS, IS SPECULATION.

11 IF YOU LOOK AT THE NEXT PAGE, IT HAS ALL THE MARKINGS ON
12 THE BATTERIES. AND I -- I DISAGREE WITH MR. KESSLER. HE SAID
13 THIS IN HIS BRIEF, AND HE'S WRONG.

14 YOU CAN TRACE, BECAUSE OF THE UNDERWRITING LABORATORY
15 STANDARDS, ALL THE WAY BACK TO THE CELL. AND THERE'S MULTIPLE
16 PIECES OF INFORMATION ON THIS BATTERY WHICH ARE DEPICTED HERE
17 WHICH ALLOW TRACEABILITY. FROM --

18 NOW, WE'RE NOT ON SUMMARY JUDGMENT HERE. THIS IS A
19 PLEADING STANDARD. THE FIRST THING IS WE HAVE NAMES ON THERE,
20 AND THE BRANDING IS IMPORTANT. THEY CHOOSE TO PUT THEIR NAME
21 ON THE PRODUCT, THAT SHOWS IT'S TRACEABLE TO THEM. AND TRYING
22 TO PUT IN BARRIERS IN BETWEEN OF INTERMARY (PHONETIC) --
23 INTERMEDIARY COMPANIES, AS YOU SAID IN YOUR ORDER, AND TO RELY
24 ON THAT WOULD BE BASICALLY TO WIPE OUT THE ROYAL PRINTING
25 EXCEPTION.

1 WE HAVE MODEL DESIGNATIONS. WE HAVE THE UNDERWRITING LAB
2 STANDARD, WHICH IS "UR" ON HERE BECAUSE THAT'S THE
3 INTERNATIONAL GLOBAL STANDARD. WE HAVE A BAR CODE ON HERE.
4 AND LET ME TELL YOU MY EXPERIENCE WITH BAR CODES. WE DON'T
5 HAVE DISCOVERY IN THIS CASE YET, BUT WE HAVE HAD DISCOVERY IN
6 ALMOST EVERY HIGH-TECH CASE IN THIS DISTRICT, AND I'VE BEEN
7 INVOLVED IN EVERY ONE OF THEM. THERE ARE BAR CODES ON ALMOST
8 EVERY ONE OF THOSE. AND WE'VE GOTTEN THE CODES -- THE KEYS TO
9 THOSE CODES IN MULTIPLE CASES, LCD, CRT, YOU CAN NAME THEM
10 ALL.

11 AND THOSE CODES TO A CODE SHOW YOU WHERE IT WAS
12 MANUFACTURED, WHAT FACTORY IT WAS MANUFACTURED IN, AND SHOW
13 YOU THE ENTIRE CHAIN OF CUSTODY GOING FORWARD TO WHERE THE
14 PRODUCT WAS SOLD. I SUSPECT WHEN WE GET TO DISCOVERY IN THIS
15 CASE, WE WILL ASK FOR THE KEYS TO THIS BAR CODE, AND IT WILL
16 TELL US THE EXACT SAME THING.

17 THE OTHER THING IS, IS THAT THIS IS PLUGGED INTO A
18 COMPUTER. AND THROUGH THE INTEGRATED CIRCUITS IN THE COMPUTER
19 AND THE INTERACTIVITY BETWEEN THE COMPUTER AND THE BATTERY,
20 YOU CAN TELL WHOSE BATTERY IS IN THERE.

21 SO I WOULD SUGGEST TO YOU, YOUR HONOR, THAT READING
22 EVERYTHING IN CONTEXT, NOT JUST THE ONE PARAGRAPH WHICH IS NOT
23 THE PARAGRAPH THAT ALLEGES ALL OF THIS, WE CAN TRACE -- AND
24 TRACEABILITY, AS YOUR HONOR POINTED OUT AND ASKED US TO DO, IS
25 IN THE COMPLAINT, TRACING BACK TO THE MANUFACTURER OF THE

1 CELL, ALL THE WAY DOWN TO WHO SOLD THE PRODUCT OR THE BATTERY.

2 AND BY THE WAY, WE DO HAVE PLAINTIFFS WHO BOUGHT
3 BATTERIES. SO WHEN HE SAYS WE DON'T HAVE ANYBODY --
4 PLAINTIFFS WHO BOUGHT BATTERIES, WE HAVE SEVEN OF THE NINE
5 CLASS REPRESENTATIVES BOUGHT ACTUAL BATTERIES, SO THAT'S NOT A
6 TRUE STATEMENT EITHER.

7 MR. KESSLER: WELL, I --

8 THE COURT: MR. KESSLER?

9 MR. KESSLER: FIRST, I DIDN'T SAY THAT, SO I WANT TO
10 BE CLEAR. THEY DO HAVE PLAINTIFFS WHO BOUGHT BATTERIES, AND
11 I'LL TALK ABOUT THEM.

12 TAKE A LOOK, YOUR HONOR -- IT'S VERY INTERESTING --
13 NO. 12, PAGE 12 OF HIS DEMONSTRATIVE, OKAY? SO LOOK AT THE
14 TOP RIGHT-HAND CORNER. IT SAYS, "CELLS MADE IN JAPAN,
15 PROCESSED IN CHINA." OKAY.

16 THE COURT: I'M SORRY. I DON'T KNOW WHAT YOU'RE
17 LOOKING AT.

18 MR. KESSLER: IF YOU LOOK AT HIS NO. 12, AT THE VERY
19 TOP RIGHT-HAND CORNER, OKAY?

20 THE COURT: YOU CAN READ THAT, MR. KESSLER?

21 MR. KESSLER: IT'S VERY HARD TO READ IT. OKAY?

22 IT SAYS, "CELLS MADE IN JAPAN." THEN IT SAYS, "PROCESSED
23 IN CHINA." OKAY? WE DON'T KNOW ANYTHING ABOUT THE CONTRACT
24 MANUFACTURING, WHETHER OR NOT PACKERS IN CHINA WERE INVOLVED,
25 ANYTHING FROM THIS -- FROM THE MERE FACT THAT IT HAS SONY

1 IDENTIFIED. THAT'S MY WHOLE POINT WHY BEING ABLE TO IDENTIFY
2 A BRAND NAME DOESN'T TELL YOU THIS BECAUSE IN PARAGRAPH 96 --
3 AND THIS IS THEIR ALLEGATION YOUR HONOR, AFTER THEY THOUGHT
4 ABOUT IT VERY CAREFULLY. AND IT'S NOT OUT OF CONTEXT -- THEY
5 THOUGHT ABOUT THIS -- IN 96, THEY SAID, WHEN A DEFENDANT OR AN
6 ENTITY -- AN ENTITY ACTING ON THE DEFENDANT'S BEHALF PACKS
7 LITHIUM ION BATTERIES FOR SALE BY THE DEFENDANT, THE PACK
8 BEARS MARKINGS IDENTIFYING THE DEFENDANT AS THE MANUFACTURER.

9 SO THE CRITICAL PROBLEM IS WE DON'T KNOW WHICH PORTION FOR
10 THIS SPECIFIC PLAINTIFF -- AND I'D ALSO POINT OUT FOR THESE
11 PLAINTIFFS, THERE'S NO REPRESENTATION THAT THESE PICTURES ON
12 11 AND 12 ARE FOR A PRODUCT PURCHASED BY ANY OF THE SPECIFIC
13 PLAINTIFFS IN THESE CASE. MAYBE THEY HAVE. MAYBE NOT.

14 (SIMULTANEOUS COLLOQUY.)

15 **MR. SIMON:** THEY ARE.

16 **MR. KESSLER:** -- THE POINT -- THE POINT, YOUR HONOR,
17 HERE IS THEY CAN'T ESTABLISH THE FACTS --

18 **THE COURT:** WELL, THE PROBLEM THAT I HAVE WITH YOUR
19 ARGUMENT, MR. KESSLER, IS THAT WE'RE AT A 12(B)(6) STAGE. AND
20 WHAT YOU'RE ASKING THE -- THE TEST THAT YOU'RE ASKING ME TO
21 APPLY TO THE PLAINTIFFS HERE REALLY SOUNDS LIKE A TEST THAT
22 SHOULD BE APPLIED AT SUMMARY JUDGMENT STAGE.

23 YOU MAY BE ULTIMATELY RIGHT. YOU WANT ME TO -- YOU'RE
24 CREATING HYPOTHETICALS -- AND PERHAPS THEY'RE ACCURATE BECAUSE
25 YOU HAVE MORE INFORMATION THAN ANYBODY ELSE IN THIS COURTROOM

1 EXCLUSIVE OF THE DEFENDANTS. BUT MY JOB ISN'T TO MAKE FACTUAL
2 DETERMINATIONS AT THIS POINT. MY JOB IS TO DECIDE WHETHER
3 THERE IS ENOUGH HERE -- AND ENOUGH THAT'S PLAUSIBLE, NOT
4 ACTUAL BUT PLAUSIBLE --

5 **MR. KESSLER:** UNDERSTOOD, YOUR HONOR.

6 **THE COURT:** -- TO -- TO ALLOW THE CASE TO MOVE
7 FORWARD.

8 AND -- AND MOST OF THE CASES THAT YOU'VE CITED TO ME ARE
9 SUMMARY JUDGMENT CASES. THEY ARE NOT 12(B)(6) CASES. SO
10 THAT -- THAT IS A FUNDAMENTAL ISSUE THAT I'M HAVING WITH YOUR
11 ARGUMENT.

12 **MR. KESSLER:** AND I -- AND I APPRECIATE THAT, YOUR
13 HONOR. AND I GUESS WHAT I WOULD SAY IS THE FOLLOWING:
14 CLEARLY, THEY DON'T HAVE TO PROVE THEIR ALLEGATIONS AT THIS
15 STAGE. THEY JUST HAVE TO MAKE ALLEGATIONS. A HUNDRED PERCENT
16 AGREE WITH THAT. WE'RE ON A MOTION TO DISMISS. WE'RE NOT ON
17 A MOTION FOR SUMMARY JUDGMENT.

18 SECOND, BECAUSE THIS IS STANDING -- AND YOUR HONOR
19 YOURSELF HAS POINTED THIS OUT IN YOUR PRIOR ILLINOIS BRICK
20 RULINGS -- THERE IS A THRESHOLD BURDEN ON THE PLAINTIFFS TO
21 COME FORWARD WITH SPECIFIC ALLEGATIONS, JUST ALLEGATIONS, NOT
22 PROVING ANYTHING, WHICH WOULD SHOW THAT THEY HAVE THE
23 STANDING.

24 WHAT WE'RE CONTENDING HERE, IT'S NOT ENOUGH TO SAY, AS
25 THEY DO IN THE COMPLAINT, THAT SOMETIMES -- SO THEY GO -- IF

1 YOU LOOK AT THEIR ALLEGATIONS, THEY'LL SAY IN ONE YEAR,
2 SOMEONE SAID PANASONIC MADE 70 PERCENT OR SOMETHING OF ITS
3 BATTERIES ITSELF. OKAY?

4 WELL, THE -- THAT'S AN ALLEGATION FOR THAT. BUT THEN IF
5 THEY WANTED TO -- TO PUT THAT THROUGH, THEY HAVE TO SAY THIS
6 PLAINTIFF BOUGHT IN THAT YEAR AND CAN ALLEGE ON INFORMATION
7 AND BELIEF THAT IT WAS ONE OF THOSE THAT CAME THROUGH THAT
8 ROUTE THAT WOULD BE OWNED OR CONTROL -- IT'S MISSING THAT
9 BURDEN FOR THEM TO SHOW THEIR STANDING.

10 SO WE DO THINK IT'S APPROPRIATE THAT THEY HAVE TO HAVE
11 FACTS WITH -- NOT ASSERTIONS. WHAT THEY'VE DONE IS THEY'VE
12 MADE ALLEGATIONS ABOUT THE CLASS AS A WHOLE WITH NO CLASS.
13 AND SO WHAT THEY'VE SAID IS, HERE ARE FACTS -- AND THEY WANT
14 THE STANDARD TO BE AS IF THIS WERE A CLASS ISSUE, ARE THERE
15 PEOPLE OUT THERE WHO WOULD HAVE ILLINOIS BRICK STANDING?

16 AND AS I SAID, THERE ARE CLEARLY SUCH PEOPLE. BUT ON A
17 MOTION TO DISMISS FOR STANDING, I BELIEVE THEY MUST HAVE THOSE
18 FACTS AND IT'S MISSING.

19 WHAT WE DID IN CHART NO. 3, IS WE WENT THROUGH THE
20 COMPLAINT PLAINTIFF BY PLAINTIFF, SO THERE'S A CHART FOR
21 EACH -- EACH PIECE OF -- AND WE BELIEVE THESE ARE THE -- THE
22 NECESSARY POINTS. WHAT THIS DOES, THIS TAKES -- PLAINTIFFS
23 HAD AN APPENDIX WHICH DID THIS THEMSELVES. WE ADDED IN RED
24 THE ALLEGATIONS WE THINK ARE MISSING. OKAY?

25 AND IN YELLOW ARE THE ALLEGATIONS THAT THEY ADDED. AND I

1 THINK IF YOUR HONOR LOOKS FOR THIS, YOU COULD EASILY IMAGINE
2 MANY PLAINTIFFS WHO COULD FILL IN THE RED. AS I SAID, DELL
3 COULD FILL IN THE RED. OKAY? THE -- THE PACKERS COULD FILL
4 IN THE RED. OTHERS COULD FILL IN THE RED. AND THE POINT HERE
5 IS JUST BECAUSE IT'S DIFFICULT FOR THESE PLAINTIFFS TO FILL IN
6 THE RED, WHY ARE THEY NOW GOING TO GO FORWARD WITHOUT STATING
7 THEIR FACTS ESPECIALLY, YOUR HONOR, I WOULD NOTE, TO BE
8 PUTATIVE CLASS REPRESENTATIVES.

9 YOU KNOW, WHAT IF IT TURNS OUT THAT THEY ALL DON'T HAVE
10 STANDING AND WE'VE GONE THROUGH IN THIS CASE -- IN OTHER
11 WORDS, THEY SHOULD HAVE TO COME FORWARD WITH AT LEAST SOMEBODY
12 WHO IS AN APPROPRIATE PLAINTIFF TO PROCEED WITH THIS CASE THIS
13 WAY. AND I'D ALSO POINT OUT, YOUR HONOR, THIS RAISES THE
14 SPECTER HOW THEY EVER COULD POSSIBLY CERTIFY A CLASS HERE
15 BASED ON THIS.

16 **THE COURT:** WE'RE NOT EVEN --

17 (SIMULTANEOUS COLLOQUY.)

18 **THE COURT:** WE'RE NOT EVEN THERE YET, SO DON'T GET
19 OFF KILTER.

20 **MR. KESSLER:** I KNOW. I'M SORRY.

21 **THE COURT:** YOU'VE MADE A COUPLE OF REFERENCES TO
22 DELL. IS THERE A PARTICULAR REASON WHY? IS THIS A
23 HYPOTHETICAL? I DON'T -- JUST WANT TO KNOW IF I'M MISSING
24 SOMETHING.

25 **MR. KESSLER:** THE REASON I'M MENTIONING DELL IS

1 BECAUSE THE ORIGINAL PLEA THAT YOUR HONOR IS FAMILIAR WITH,
2 THAT GAVE RISE TO THIS CASE, HAVE (SIC) TO DO WITH
3 CYLINDRICAL -- LITHIUM ION -- CELLS FOR CYLINDRICAL LITHIUM
4 ION BATTERIES FOR LAPTOP COMPUTERS, AND DELL IS A VERY
5 PROMINENT LAPTOP COMPUTER MANUFACTURER WHO WOULD HAVE
6 PURCHASED BATTERIES CERTAINLY FROM THE VARIOUS DEFENDANTS, AS
7 WOULD HP AND -- OR OTHERS OF THAT TYPE, AND -- AND CELLS. SO
8 JUST -- THAT JUST HAPPENS TO BE A --

9 **THE COURT:** OKAY.

10 **MR. KESSLER:** -- WHAT WAS THE SUBJECT --

11 **MR. SIMON:** AND, YOUR HONOR --

12 **MR. KESSLER:** -- OF THAT PLEA, SO --

13 **THE COURT:** ENOUGH.

14 MR. SIMON?

15 **MR. SIMON:** OKAY. FIRST OF ALL, WITH RESPECT TO DELL
16 AND HP, UNTIL THEY OTHERWISE INDICATE, THEY ARE PART OF THE
17 CLASS. THEY BOUGHT BATTERIES, JUST LIKE SEVEN OF NINE
18 PLAINTIFFS, SO THEY MAY, AS THEY HAVE DONE IN OTHER CASES,
19 DECIDE TO PURSUE THEIR OWN INDIVIDUAL CASE, BUT THE FACT THAT
20 THERE IS A CLASS MEMBER OUT THERE WHO HAS NOT COME FORWARD TO
21 BRING A CASE DOES NOT DEPRIVE US OF STANDING.

22 THAT'S POINT ONE. POINT TWO IS, AGAIN, MR. KESSLER IS
23 KIND OF PICKING AND CHOOSING WHICH ALLEGATIONS TO TALK TO YOU
24 ABOUT.

25 IF YOU COULD TURN TO OUR POWERPOINT FOR A MOMENT -- AND,

1 YOU KNOW, I APOLOGIZE FOR JUMPING IN, BUT I THINK THE BACK AND
2 FORTH ON THIS POINT ARE THE CRITICAL ISSUES.

3 STARTING ON PAGE 5, NOT SURPRISINGLY, DIFFERENT FROM HIS
4 CHART IS OUR FIRST CHART SHOWING EACH OF THE COMPANIES AND
5 INDIVIDUALS AND WHAT PRODUCTS THEY BOUGHT -- JUST WHAT YOU
6 ASKED US TO DO, WHO THEY BOUGHT IT FROM, WHICH IS THE FIRST
7 DEFENDANT, SONY ELECTRONICS, INC., WHO IS A CONSPIRATOR --
8 ALLEGED CONSPIRATOR, WHOLLY OWNED SUBSIDIARY RIGHT ABOVE THEM
9 AND GOING BACK TO THE CELL MANUFACTURER SONY CORPORATION,
10 WHO'S ALSO ALLEGED TO BE A CONSPIRATOR. THERE IS NO BREAK IN
11 THE CHAIN.

12 BY THE WAY, THE WELL-PLED ALLEGATIONS OF THIS COMPLAINT,
13 WHICH THE COURT IS SUPPOSED TO ACCEPT ON THE MOTION TO
14 DISMISS, NOT MR. KESSLER'S SPECULATION OR DEFENDANT'S
15 SPECULATION, SAY THAT DURING PERIODS OF TIME, SONY PACKED 100
16 PERCENT OF THEIR BATTERIES FOR THEIR NOTEBOOK COMPUTERS FOR A
17 PERIOD OF TIME, I BELIEVE, BETWEEN 2008 AND 2010.

18 SO FOR PURPOSES OF PLAUSIBLE INFERENCE THAT WE CAN SHOW
19 TRACEABILITY AND BRING YOU ALL THE WAY BACK THROUGH THE CHAIN,
20 WE CAN, WITH WELL-PLED ALLEGATIONS IN THE COMPLAINT THAT
21 MR. KESSLER CHOOSES NOT TO TALK TO YOU ABOUT.

22 WE DO THE SAME THING ON THE NEXT SLIDE, WHICH IS
23 UNIVISIONS CRIMONS (PHONETIC) -- CRIMSON'S HOLDING. THIS IS
24 PAGE 6. WE TELL YOU THAT -- WHAT THEY BOUGHT. WE HAVE THE
25 BRAND NUMBER, THE MODEL NUMBERS FOR THE MOST PART. YOU KNOW,

1 THESE PLAINTIFFS, WHEN WE GET INTO DISCOVERY, WILL HAVE
2 INVOICES SHOWING THAT THEY PAID THE DEFENDANTS THAT ARE THE
3 DEFENDANTS IN THIS CASE. AND THIS --

4 I COULD GO THROUGH EACH ONE OF THESE FOR YOU, BUT WE HAVE
5 DONE EXACTLY WHAT THE COURT ASKED US TO DO. AND IN SLIDES 5
6 THROUGH 8, WE SET FORTH THE UNBROKEN CHAIN WITH PLAUSIBLE
7 INFERENCES AS TO WHY EACH OF THESE CONTROLLED ENTITIES ARE
8 INVOLVED IN THE DISTRIBUTION OF THESE PRODUCTS.

9 MR. KESSLER IS ASKING YOUR HONOR TO DO SOMETHING
10 UNPRECEDENTED IN THIS -- IN THIS COURT AND IN THIS DISTRICT.
11 AND HE DOESN'T HAVE A CASE AND THE DEFENDANTS DON'T HAVE A
12 CASE THAT SAY THAT WE HAVE TO DO WHAT HE IS SAYING WE HAVE TO
13 DO.

14 THAT IS WHY NO DIRECT PURCHASER CASE IN THIS DISTRICT,
15 GOING THROUGH MULTIPLE JUDGES, HAS BEEN DISMISSED ON THE BASIS
16 THAT MR. KESSLER AND THE DEFENDANTS ARE ASKING THIS COURT TO
17 DISMISS US. NO OTHER JUDGE HAS DONE IT. AND HE CAN'T DENY
18 THAT. TWO COURTS HAVE ALREADY POINTED THAT OUT INCLUDING
19 JUDGE ILLSTON IN LCD. IN LCD, AFTER WE TRIED OUR CASE, THERE
20 WERE ACTIONS BROUGHT BY DIRECT PURCHASERS WHO WERE INDIVIDUAL
21 CASES, THE DELLS, THE HP'S, AND THINGS LIKE THAT.

22 IT WENT ALL THE WAY TO SUMMARY JUDGMENT ON STANDING IN
23 FRONT OF JUDGE ILLSTON ON BEHALF OF SOME OF THOSE OEM'S. THEY
24 OPTED OUT OF THE CLASS. THEY BROUGHT THEIR OWN CASES. WENT
25 ALL THE WAY TO SUMMARY JUDGMENT ON STANDING. JUDGE ILLSTON

1 DENIED THE SUMMARY JUDGMENT ON STANDING. IN THAT RULING, SHE
2 SAYS, IT IS A FACTUAL ISSUE AS TO WHETHER OR NOT SYSTEMS
3 INTEGRATORS, ODM'S," WHICH ARE ORIGINAL DEVICE -- DESIGN
4 MANUFACTURERS," AND THIRD PARTIES, HELPED ASSEMBLE THE
5 PRODUCT.

6 SHE SAID BASICALLY THAT DOESN'T MATTER TO ME ON STANDING.
7 IT'S A FACTUAL ISSUE. AND THE FACTUAL ISSUE AS TO WHETHER
8 THEY DID ANYTHING OR THE TRANSACTION WOULD BREAK THE CHAIN AS
9 MR. KESSLER'S SAYING AND WHETHER THEY EVEN BOUGHT THE
10 PRODUCTS, 'CAUSE OFTENTIMES, IT'S BY A TRANSFER PRICE, WHICH
11 IS NOTHING MORE THAN ACCOUNTING ENTRY AND THERE IS NO ACTUAL
12 CHANGE OF TITLE.

13 WE ARE NOT ASKING IN THIS CASE THAT THE BATTERIES THAT
14 WERE PACKED BY THE THIRD PARTIES THAT PUT THEIR OWN NAME ON IT
15 ARE PART OF THIS CLASS.

16 WE ARE SAYING AS A FACTUAL MATTER, IT IS WELL PLED IN THIS
17 COMPLAINT THAT THE OTHER THREE CATEGORIES, DEFENDANTS PACKING
18 THE BATTERIES THEMSELVES, DEFENDANTS HAVING AN AGENT PACK THE
19 BATTERIES, THOSE CATEGORIES AND -- WHERE THEY IN EFFECT --
20 THERE'S NO TITLE TRANSFER, AND THE BATTERY HAS NOTHING DONE TO
21 IT, JUST LIKE IN LCD, THAT IS -- WOULD DO ANYTHING TO CHANGE
22 THE FACT THAT WE ARE THE FIRST PURCHASERS OUTSIDE OF THE
23 CARTEL. AND THAT'S WHAT WE ARE. WE ARE THE FIRST PURCHASERS
24 OUTSIDE THE CARTEL.

25 MR. KESSLER'S SPECULATION ABOUT WHAT MIGHT BE IN A PACKED

1 BATTERY OR NOT IS NOT -- UNDER THE STARR CASE, CANNOT HAVE
2 THIS CASE DISMISSED UNLESS HIS EXPLANATION WITH FACTS FROM THE
3 COMPLAINT -- NOT HIS SPECULATION -- IS SO CONVINCING THAT IT
4 RENDERS OUR WELL-PLED ALLEGATIONS IMPLAUSIBLE.

5 HE CANNOT FULFILL THAT STANDARD.

6 **THE COURT:** OKAY.

7 **MR. KESSLER:** YOUR HONOR, IF I MAY?

8 **THE COURT:** NO. HOLD ON. YOU NEED TO MOVE ON,
9 BECAUSE I HAVE A REQUEST BY ALL OF THE DEFENDANTS TO BE ABLE
10 TO ARGUE THEIR INDIVIDUAL MOTIONS, AND I THINK I'VE HEARD
11 ENOUGH ON THIS.

12 **MR. KESSLER:** YOUR HONOR, COULD I JUST HAVE ONE
13 MINUTE MORE --

14 **THE COURT:** YOU'RE ON THE CLOCK.

15 **MR. KESSLER:** -- ON ILLINOIS BRICK AND THEN I'LL MOVE
16 TO AGC?

17 **THE COURT:** YOU'RE ON THE CLOCK.

18 **MR. KESSLER:** OKAY. THIS IS A GOOD ILLUSTRATION WHY
19 YOU HAVE TO LOOK AT THE COMPLAINTS AND NOT WHAT ANY OF THE
20 LAWYERS SAY.

21 IF YOU LOOK AT PARAGRAPHS 90 AND 91, YOU WILL FIND THERE'S
22 NO ALLEGATION, AS MR. SIMON SAID, THAT SONY PACKED A HUNDRED
23 PERCENT OF ITS BATTERIES IN 2008 TO 2010. DOESN'T EXIST.

24 WHAT EXISTS IS A REFERENCE TO ONE TIME ON MARCH 12 TO
25 16TH, 2002, AND ONE TIME IN JULY 2005. AND WHAT HE DOESN'T DO

1 IS FOR ANY OF THE OTHER 11 YEARS OF THE CONSPIRACY OR FOR ANY
2 OF THE OTHER PERIODS HAVE ANY ALLEGATION THAT THESE SPECIFIC
3 PLAINTIFFS BOUGHT AT THESE SPECIFIC TWO PINPOINTS IN A 12-YEAR
4 CONSPIRACY --

5 **THE COURT:** MR. KESSLER?

6 **MR. KESSLER:** THAT'S THE PROBLEM.

7 **THE COURT:** MOVE ON.

8 (SIMULTANEOUS COLLOQUY.)

9 **THE COURT:** AND I'M SAYING IS THAT BECAUSE IT IS
10 INCONCEIVABLE TO ME THAT SONY ON ONE DAY COULD PACK A HUNDRED
11 PERCENT OR THAT THERE'S SOME REASONABLE BASIS FOR MAKING THAT
12 ALLEGATION, AND THEN A DAY LATER IS NOT. OR TWO WEEK -- DAYS
13 LATER OR MAYBE A WEEK LATER. WE AREN'T -- WE DON'T HAVE ALL
14 OF THE FACTS IN FRONT OF US RIGHT NOW. I GET YOUR POINT.
15 MOVE ON.

16 **MR. KESSLER:** OKAY. YOUR HONOR. I'M GOING TO MOVE
17 ON TO THE AGC ARGUMENT.

18 SO WITH RESPECT TO AGC, THIS IS GOING TO BE A FAMILIAR
19 ARGUMENT TO YOUR HONOR BECAUSE IT'S VERY SIMILAR TO WHAT WAS
20 COVERED IN THE INDIRECT MOTION. AND SO I'M NOT GOING TO
21 BELABOR THIS AT ALL. I'M JUST GOING TO MAKE THE FOLLOWING TWO
22 POINTS: THAT FIRST, THIS IS A CELL CASE AND BECAUSE THEY ARE
23 DEALING WITH PLAINTIFFS WHO BOUGHT FINISHED PRODUCTS OR
24 BATTERIES, EITHER ONE, THEY ARE SOME -- THERE'S BATTERIES,
25 TOO -- NEITHER OF THOSE PRODUCTS ARE IN THE SAME MARKET. WE

1 BELIEVE THAT'S DISABLING UNDER THE ANTITRUST INJURY
2 REQUIREMENT OF THE NINTH CIRCUIT.

3 WE BELIEVE -- WE HAVE NOT CONCEDED, BY THE WAY, THEY'RE IN
4 THE SAME MARKET. I DON'T KNOW WHY THEY'VE SAID THAT SO, I'LL
5 MAKE THAT VERY CLEAR, THAT BATTERIES ARE NOT IN THE SAME
6 MARKET. THE TEST IS INTERCHANGEABILITY AS SET FORTH BY BOND
7 IT'S NOT THERE.

8 OTHER PEOPLE ARE IN THAT MARKET OF -- OF THE CELL
9 CONSPIRACY AND COULD -- LIKE THE PACKERS AND COULD ASSERT
10 ANTITRUST INJURY WE BELIEVE --

11 **THE COURT:** NOW, ONE OF THE THINGS THAT YOU --
12 NEITHER OF YOU REALLY TALKED ABOUT AND PERHAPS IT HAS NO
13 RELEVANCE BUT I'LL ASK SINCE YOU ARE BOTH THE EXPERTS: IN --
14 IN FIGURING OUT MARKETS, INTERCHANGEABILITY IS ONE ISSUE, BUT
15 SO IS CROSS-ELASTICITY.

16 **MR. SIMON:** YOUR HONOR, I WOULD SAY NO. TWO COURTS,
17 JUDGE HAMILTON IN DRAM AND JUDGE ILLSTON IN LCD SAID THAT
18 THOSE ARE NOT REQUIREMENTS. IN FACT, IT'S THE MINORITY THAT
19 TALKS ABOUT CROSS-ELASTICITY AND INTERCHANGEABILITY.

20 WHAT THE MAJORITY OF CASES SAY, LCD, CRT, ODD, FLASH, GPU,
21 IS THAT IT -- THE PRODUCT IS A SEPARATE COMPONENT AND IT'S
22 TRACEABLE. THOSE ARE THE -- THOSE ARE THE BIG FACTORS AS TO
23 WHETHER OR NOT IT'S IN ONE MARKET FOR AGC PURPOSES. IT'S AN
24 ABSOLUTE FACT. YOUR HONOR SAID IT AT THE HEARING ON THE IPP
25 AGC ARGUMENT, THAT THE BATTERY DOES NOT WORK WITHOUT THE CELL.

1 IN FACT, THE CELL IS DANGEROUS AND CAN BLOW UP UNLESS IT'S IN
2 A BATTERY PACK. THEY ARE INEXTRICABLY TIED TO EACH OTHER, SO
3 IS THE BATTERY TO THE PRODUCTS. IT'S THE POWER SOURCE. A
4 PORTABLE COMPUTER, YOU CAN PLUG IT IN, BUT WHO WANTS A
5 PORTABLE COMPUTER THAT YOU HAVE TO FIND A PLUG ALL THE TIME.
6 IT'S THE BATTERY THAT IS CRITICAL.

7 SO THE ANSWER TO YOUR QUESTION IS REALITY AND ECONOMIC
8 REALITY AND THE HOLDINGS IN ALL THE CASES THAT DO NOT REQUIRE
9 CROSS-ELASTICITY OR INTERCHANGEABILITY BUT SIMPLY TRACEABILITY
10 AND SEPARATENESS OF THE COMPONENT PRODUCT.

11 **THE COURT:** MR. --

12 **MR. KESSLER:** YOUR HONOR?

13 **THE COURT:** -- KESSLER?

14 **MR. KESSLER:** OKAY. IN -- IT IS CORRECT THAT JUDGE
15 ILLSTON SAID "INEXTRICABLY ENTWINED" COULD IN THAT CASE
16 PROVIDE THE LINK FOR THE MARKETS. BUT WHAT WAS DIFFERENT IN
17 LCD AND WHAT WAS DIFFERENT IN CRT AND WHAT WAS DIFFERENT IN
18 ODD, AS I ARGUED LAST TIME, WAS THE COMPONENT WAS, LIKE, 60,
19 70 PERCENT OF THE COST OF THE FINISHED PRODUCT SO THAT THE
20 COURTS WERE ABLE TO FIND IN EFFECT THE TWO WOULD MOVE TOGETHER
21 BECAUSE OF THE SIGNIFICANCE (SIC) AMOUNT OF THE COST.

22 HERE, BECAUSE THEY'RE AT CELL LEVEL OF THE CONSPIRACY --
23 AND WE POINTED THIS OUT IN YOUR (SIC) BRIEF, YOUR HONOR --
24 THEY'RE TALKING ABOUT CELLS THAT COST 16 CENTS A CELL OR LESS.
25 SO NOW YOU'RE A PURCHASER OF A \$500 LAPTOP COMPUTER. HOW IS

1 THE MARKET FOR LAPTOP COMPUTERS INEXTRICABLY LINKED WITH A
2 CELL THAT COSTS 15 -- THIS IS IN THEIR COMPLAINT
3 ALLEGATIONS -- PARAGRAPH 167 TALKS ABOUT A -- THE CELL OF 16
4 CENTS. PARAGRAPH 179 TALKS ABOUT THE WHO WILL BATTERY, THE
5 WHOLE BATTERY, COSTING 50 CENTS. AND SO THE POINT HERE IS IF
6 YOU'RE THE END FINISHED PRODUCT PURCHASER, HOW COULD THAT
7 POSSIBLY BE INEXTRICABLY LINKED.

8 IT WOULD BE AS IF IN THIS LCD CASE, THE CONSPIRACY WAS
9 ALLEGED TO BE JUST OF A WIRE THAT WENT SOMEHOW INTO THE GLASS
10 THAT MADE THE LCD. WE SUBMIT JUDGE ILLSTON WOULD NOT FIND
11 THOSE MARKETS INEXTRICABLY LINKED.

12 **MR. SIMON:** YOU MEAN -- I'M SORRY --

13 **MR. KESSLER:** I'M SORRY, YOUR HONOR.

14 **MR. SIMON:** I'M SORRY TO INTERRUPT YOU.

15 **MR. KESSLER:** SECOND DEFECT, YOUR HONOR, IS THE
16 DIRECTNESS POINT. AND, AGAIN, I WOULD JUST REITERATE LAST
17 TIME, IT'S TOO MANY LEVELS.

18 **THE COURT:** AND I DON'T NEED YOU TO TOTALLY REARGUE
19 IT. IT'S ALWAYS HELPFUL TO GET THE BIG PICTURE, BUT I THINK
20 THE POINT LAST TIME AND THE ALLEGED CONCESSION THAT WAS
21 DISCUSSED WAS WHEN I ASKED YOU IF I DON'T FIND ANY FUNDAMENTAL
22 DIFFERENCE BETWEEN YOUR FIRST TWO LEVELS, THEN WHERE DOES THAT
23 ANALYSIS LEAD.

24 THAT'S WHERE THE CONCESSION PIECE CAME IN.

25 **MR. KESSLER:** OKAY.

1 **THE COURT:** AND -- AND THAT WILL -- THAT WOULD END UP
2 GETTING RESOLVED, BUT IT IS A DISTINCTION YOU ARE MAKING. IT
3 IS A DISTINCTION I HAVE NOT YET --

4 **MR. KESSLER:** OKAY.

5 **THE COURT:** -- MADE.

6 **MR. KESSLER:** SO WHAT I WOULD SAY, YOUR HONOR, IF THE
7 LEVELS NUMBER DOESN'T MATTER, WE STILL HAVE THE SAME TWO
8 FUNDAMENTAL PROBLEMS SO THERE'S NO CONCESSION.

9 THE FIRST PROBLEM IS -- AND THIS GOES EVEN FOR HIS BATTERY
10 PURCHASERS, SO THERE'S ONLY ONE LEVEL BETWEEN THE BATTERY
11 PURCHASE AND THE CELL, SO I COULD DEAL WITH IT THAT WAY.
12 OKAY.

13 IT'S DIFFERENT PRODUCTS IN DIFFERENT MARKETS. IT'S NOT
14 INTERCHANGEABLE. THERE'S NO CROSS-ELASTICITY. HE HAS A
15 PROBLEM FOR (SIC) THAT.

16 OKAY.

17 **THE COURT:** WELL, ISSUES OF CROSS-ELASTICITY -- AND I
18 UNDERSTAND THAT YOU'RE NOT CONCEDED THAT THAT'S THE TEST, BUT
19 I -- BUT, AGAIN, IT SEEMS TO ME THAT THE STAGE IS IMPORTANT,
20 THE PROCEDURAL POSTURE IS IMPORTANT.

21 ISSUES OF DEFINING MARKETS IN TODAY'S GLOBAL ENVIRONMENT
22 ARE DIFFICULT. WE ARE NOT IN A -- IN AN ENVIRONMENT WHEN
23 ILLINOIS BRICK WAS WRITTEN. MARKETS ARE -- ARE COMPLICATED.
24 AND I'VE GOT A -- GOT A CASE COMING IN NEXT WEEK, AN ANTITRUST
25 CASE, WHERE THE -- WHERE THE REPORTS FROM THE ECONOMISTS, YOU

1 KNOW, ARE SIX TO NINE INCHES LONG BECAUSE IT'S NOT EASY, ALL
2 SORTS OF COMPLICATED MATHEMATICAL ANALYSES ARE DONE IN ORDER
3 TO FIGURE OUT AND DEFINE WHAT MARKETS ARE. AND THEY DO NOT
4 SEEM TO ME TO BE -- TO REST ON PLANES ANYMORE. THAT IS --
5 THEY'RE -- IT'S NOT A VERTICAL LINE, A MARKET.

6 **MR. KESSLER:** YOUR HONOR, IF I MAY.

7 **THE COURT:** SO -- NO, SO I WANT YOU TO ADDRESS, THEN,
8 THE CROSS-ELASTICITY IN THAT KIND OF CONTEXT. IF THAT WAS THE
9 RULE, WHAT -- WHAT WOULD YOUR POSITION BE?

10 **MR. SIMON:** IT -- WHAT I WOULD SAY, YOUR HONOR, IS
11 CROSS-ELASTICITY AND INTERCHANGEABILITY, AS YOU POINTED OUT,
12 ARE ECONOMIC TERMS. THEY COME FROM BHAN, WHICH IS A CASE THAT
13 INVOLVED A NURSE ANESTHESIOLOGIST AND A DOCTOR. AND -- AND IT
14 WAS AN ISSUE AS TO WHETHER OR NOT THE NURSE ANESTHESIOLOGIST
15 WAS BEING FREEZED (PHONETIC) OUT OF THE HOSPITAL BECAUSE THEY
16 WOULD ONLY LET DOCTORS APPLY THE ANESTHESIA.

17 IT'S A TOTALLY DIFFERENT CONTEXT. NOT IN ONE DIRECT
18 PURCHASER PRICE-FIXING CASE, A SECTION 1 PRICE FIXING CASE IN
19 THE DIRECT PURCHASER SIDE, HAS CROSS-ELASTICITY OR
20 INTERCHANGEABILITY BEEN APPLIED. AND, YOU KNOW, YOU CAN GO
21 BACK AND LOOK AT THE CASES. WE DO HAVE A FEW SLIDES ON IT.
22 IT'S 22, 23 -- ARE TWO OF THE SLIDES, AND I WAS IN LCD, LIKE
23 MR. GLACKIN. I WAS COLEAD COUNSEL WITH MR. GLACKIN. I LIVED
24 AND BREATHED LCD FOR FIVE AND A HALF YEARS.

25 EVERY PERMUTATION OF IT AND EVERY ARGUMENT THAT IS BEING

1 MADE HERE WAS BEING MADE THERE. SLIDE 22 TELLS YOU JUST LIKE
2 IN BATTERIES, IN LCD AND CRT, THEY -- THE PRODUCT HAS TO BE
3 ASSEMBLED TO BE USEFUL. USEFULNESS, REALITY, ECONOMIC REALITY
4 IS WHAT I WOULD ASK YOUR HONOR TO CONSIDER IN DETERMINING
5 WHETHER IT'S A MARKET.

6 TO TAKE OUT US ON A STANDING BASIS FROM THIS CASE WILL
7 CREATE A GIGANTIC HOLE WHICH WE DEPICTED ON PAGE 2 AS THE
8 GAPING HOLE REFERRED TO IN SUGAR -- TAKE OUT A WHOLE SWATH OF
9 PURCHASERS IN THIS CASE.

10 NOW, MR. KESSLER MAKES THE POINT, WELL, IT'S ONLY A FEW
11 CENTS HERE, FEW CENTS THERE, WHAT'S THE BIG DEAL? WELL, WE'RE
12 TALKING ABOUT, BY THE WAY, LAPTOP COMPUTERS ALMOST EVERY
13 COMPONENT OF WHICH IS WAS PRICE-FIXED BY THESE VERY SAME
14 DEFENDANTS, NUMBER ONE, SO IT IS A BIG DEAL.

15 THESE DEFENDANTS PRICE FIXED, YOU KNOW, THE DRAM, THE LCD
16 SCREEN, YOU KNOW, ALL -- ALL SORTS OF THINGS. IT'S A
17 CONTINUING PATTERN OF GLOBAL COMPANIES PRICE FIXING AND THEN
18 TRYING TO STAND BEHIND AN IMMUNITY BY SAYING WE DON'T HAVE
19 STANDING. AND THAT'S JUST NOT RIGHT.

20 THE FACT OF THE MATTER IN LCD, AS JUDGE ILLSTON SAID IN A
21 RULING, THERE ARE -- THERE WERE SYSTEM ASSEMBLERS,
22 INTEGRATORS, AND OTHERS WHO ASSEMBLED THE PRODUCTS. SHE FOUND
23 THAT NOT TO BE ANY DIFFERENCE.

24 IN CRT, THERE'S A YOLK THAT HAS TO GO ON THE TUBE. DOES
25 THAT REALLY CHANGE THE MARKET? NO, IT DOESN'T CHANGE THE

1 MARKET.

2 YOU KNOW, YOU COULD TAKE -- I COULD BRING MY LAPTOP UP
3 HERE, I COULD POP THE SCREEN OFF AND I COULD SHOW YOU WHAT THE
4 MODULE LOOKS LIKE. THE MODULE IN THE LCD IS WAY MORE
5 COMPLICATED THAN THE BATTERY PACK IN THIS CASE. IN FACT, LCD
6 PROBABLY WAS A HARDER CASE THAN THIS CASE. NOT -- NOT THE WAY
7 THAT MR. KESSLER IS TELLING YOU.

8 AND IF YOU LOOK AT SLIDE 23, YOUR HONOR, THIS WHOLE IDEA
9 THAT, YOU KNOW, THE PRICE IS DE MINIMIS, WHICH IS THEIR
10 ARGUMENT, YOU HAVE TO TAKE THAT INTO CONSIDERATION OF THE
11 HUNDREDS OF MILLIONS OF DOLLARS THAT THESE DEFENDANTS MADE ON
12 EACH AND EVERY ONE OF THESE PRODUCTS BY THESE INCREMENTAL
13 AMOUNTS. AND THEY DID. WE'RE TALKING ABOUT HUNDREDS OF
14 MILLIONS OF BATTERIES AND FINISHED PRODUCTS.

15 AND ON THIS CHART, YOU CAN SEE THAT THE -- THE DECIDING
16 FACTOR IS NOT THE PERCENTAGE, AS MR. KESSLER POINTS OUT. IT
17 IS A FACTOR, AND IT IS ALSO A FACTUAL ISSUE THAT WE NEED TO GO
18 TO ON A FULLER RECORD. BUT IF YOU LOOK AT THE TOP ON LCD, THE
19 COMPUTER MONITOR, THE SCREEN IS ABOUT 75 PERCENT OF IT; THE
20 TELEVISION, 47 PERCENT; THE NOTEBOOK COMPUTER, 15 PERCENT. SO
21 THERE'S A WIDE VARIETY OF WHAT PERCENTAGE THE COMPONENT WAS OF
22 THE FINISHED PRODUCT PRICE.

23 AND HE'S WRONG ABOUT ODD BECAUSE IF YOU LOOK AT THE BOTTOM
24 ABOUT ODD AND YOU LOOK AT A COMPUTER -- A NOTEBOOK COMPUTER,
25 THE ODD IS BELOW 10 PERCENT OF THE TOTAL PRICE OF THE

1 COMPUTER, AND JUDGE SEEBORG FOUND THAT NOT TO BE A DISABLING
2 FACTOR ON STANDING. AND WE'RE TALKING ABOUT THE PLEADING
3 STAGE HERE.

4 THIS WILL ALL COME OUT IN DISCOVERY. WE HAVE ASKED THE
5 DEFENDANTS FOR THEIR TRANSACTIONAL DATA, WHICH THEY ARE
6 FIGHTING US ON. AND IN THE TRANSACTIONAL DATA IN EVERY ONE OF
7 THESE CASES, YOU WILL FIND OUT WHETHER WHAT HE'S SAYING IS
8 RIGHT IS PROVABLE OR NOT. AND THIS IS NOT THE STAGE TO TEST
9 IT.

10 **THE COURT:** ALL RIGHT. MR. KESSLER.

11 **MR. KESSLER:** YOUR HONOR, WHAT MR. SIMON DIDN'T DO
12 WAS ANSWER YOUR QUESTION. YOUR QUESTION WAS IF
13 INTERCHANGEABILITY IS -- OR CROSS-ELASTICITY, YOUR HONOR SAID,
14 IS THE TEST, HOW WOULD THAT BE APPLIED HERE.

15 THE REASON HE DIDN'T ANSWER IT IS BECAUSE IT CAN'T BE
16 CROSS ELA- -- ANY CROSS-ELASTICITY, AND I'LL EXPLAIN WHY.

17 AND I'LL ALSO EXPLAIN, YOUR HONOR, WHY THE BIG EXPERT
18 REPORT YOU HAVE ON RELEVANT MARKET WILL -- IF YOUR HONOR READS
19 THAT IN THAT CASE, WILL, I THINK, ILLUSTRATE THIS TO YOU.

20 THE ISSUE IN RELEVANT MARKET THAT FREQUENTLY GETS
21 LITIGATED AND YOU GET VOLUMINOUS REPORTS ABOUT IS ESTABLISHING
22 WHAT PRODUCTS COMPETE --

23 **THE COURT:** STAY IN FRONT OF THE MIC.

24 **MR. KESSLER:** SORRY.

25 -- WHAT PRODUCTS COMPETE WITH EACH OTHER. THAT'S THE

1 ISSUE. AND YOU COULD HAVE GREAT ECONOMIC DEBATES. DOES IT --
2 DOES THIS TYPE OF PRODUCT -- DOES JUICE COMPETE WITH MILK?
3 DOES COKE GO IN THE PRODUCT?

4 YOU ALSO COULD HAVE A GEOGRAPHIC THING. DO PRODUCTS IN
5 SWEDEN COMPETE WITH THE UNITED STATES? EVERYTHING ABOUT
6 CROSS-ELASTICITY IS DO THEY COMPETE WITH EACH OTHER SO THEY
7 AFFECT THE PRICE. AND YOU'LL FIND REGRESSION ANALYSES ABOUT
8 THAT, ET CETERA.

9 WHAT YOU WON'T EVER FIND BECAUSE HE CAN'T ALLEGE IT IS
10 THAT A COMPONENT COMPETES WITH ITS PRODUCT. IN OTHER WORDS,
11 THERE'S NO ARGUMENT HERE. THERE'S NO ECONOMIST THEY EVER WILL
12 PRODUCE -- SO I UNDERSTAND THAT'S WHY -- AND HE CAN'T ALLEGE
13 IN THE COMPLAINT -- THAT'S THE IMPORTANT POINT FOR YOUR HONOR
14 HERE -- THAT A COMPONENT, A CELL, COMPETES WITH A BATTERY.
15 WHY? BECAUSE THERE'S NO CONCEIVABLE WAY THAT ONE COULD EVER
16 REPLACE THE OTHER, SO THERE COULD BE NO CROSS-ELASTICITY.

17 CERTAINLY IT DOESN'T COMPETE WITH A CELL PHONE OR A LAPTOP
18 COMPUTER OR ANYTHING ELSE. SO THE PROBLEM HE HAS AND THE TEST
19 COMES NOT JUST IN THE DISTRICT COURTS. IT COMES FROM THE
20 UNITED STATES SUPREME COURT, WHICH SAID YOU MUST BE IN THE
21 SAME MARKET. IT'S ANTITRUST INJURY. AND NO, WE'RE NOT
22 CONDEMNING THESE PEOPLE NOT TO BRING CLAIMS.

23 AGAIN, I SAID THE ISSUE IS THEY MAY HAVE CLAIMS, BUT THEY
24 DON'T HAVE THESE CLAIMS. THAT'S -- THAT'S THE FUNDAMENTAL
25 PROBLEM. THERE ARE PEOPLE WHO HAVE FEDERAL ANTITRUST CLAIMS.

1 THESE PEOPLE DON'T.

2 THE SECOND THING, YOUR HONOR, IF I MAY, WE -- I HEAR A LOT
3 ABOUT LCD, AND I CONFESS I WASN'T IN LCD, BUT I CAN READ THE
4 DECISIONS. AND WHAT TELLS US AS LAWYERS AND JUDGES WHAT THE
5 CASE MEANS IS WHAT THE DECISIONS SAY.

6 IN THE MARCH -- I'M SORRY. IN THE AUGUST 25TH, 2008
7 DECISION IN LCD -- BECAUSE THERE ARE MANY, MANY DECISIONS,
8 YOUR HONOR -- IN THAT ONE, WHEN YOU READ -- AND THIS IS THE
9 ONE THAT GRANTED AGC. WHAT JUDGE ILLSTON ACTUALLY SAID IS
10 WHAT MOVED HER NOT TO DENY AGC IN THIS THING WAS BECAUSE THE
11 PLAINTIFFS IN THAT CASE -- AND SHE WAS LOOKING JUST AT THE
12 INDIVIDUAL PLAINTIFFS, OKAY, PURCHASED DIRECTLY FROM A CARTEL
13 MEMBER, PART OF THE CARTEL THAT WAS THERE. SHE WAS LOOKING AT
14 IT THAT WAY. THE PROBLEM THEY HAVE HERE, YOUR HONOR, IS THE
15 CELL COMPANIES ARE THE CARTEL MEMBERS ALLEGED THAT'S HERE.

16 WHEN THEY SAY THEY'RE PURCHASING, FOR EXAMPLE, FROM
17 SONY.COM, A SALES COMPANY TRACED DOWN UNDER SONY THING (SIC),
18 THAT'S NOT TO CARTEL MEMBER BECAUSE WHEN THEY'RE -- WHEN
19 THEY'RE BUYING A LAPTOP COMPUTER FROM THEM, IT'S A COMPLETELY
20 DIFFERENT PRODUCT. SONY.COM, WHO SELLS LAPTOP COMPUTERS -- IT
21 DOESN'T SELL CELLS. IT DOESN'T -- IN OTHER WORDS, IT WOULDN'T
22 SELL A CELL TO ANYBODY, IS NOT A PARTICIPANT THE WAY THAT
23 JUDGE ILLSTON FOUND HERE.

24 THAT'S JUST WHAT THE DECISION SAYS.

25 **THE COURT:** WELL, WHO SOLD --

(SIMULTANEOUS COLLOQUY.)

THE COURT: WHO SOLD THAT TO THE -- TO THE ONLINE COMPANY. THEY AREN'T -- THE ONLINE COMPANY ISN'T GOING TO SUE THE SUPPLIER.

MR. KESSLER: YOUR HONOR, THAT'S THE ILLINOIS BRICK ISSUE. OKAY? IT'S NOT THE AGC ISSUE. THAT'S WHY THEY'RE DIFFERENT. THE ANTITRUST INJURY ISSUE IS FATAL WHEN YOU'RE TALKING ABOUT SOMEONE BUYING A LAPTOP, OKAY, WAY DOWN -- AND, IN FACT, SOMEONE BUYING A LAPTOP WAY DOWN IN A LAPTOP MARKET OR WHATEVER LAPTOP COMPETES WITH -- CROSS-ELASTICITY ISSUE IS MAYBE THEY COMPETE WITH TABLETS. THEY PROBABLY DO. MAYBE THEY COMPETE WITH OTHER KINDS OF PRODUCTS THAT DO THOSE THINGS. BUT THEY DON'T COMPETE WITH CELLS FOR BATTERIES. THAT'S THE ANTITRUST INJURY ISSUE THAT WE'RE -- THAT WE'RE DEBATING HERE ABOUT THAT.

SO, YOUR HONOR, I JUST WANTED -- YOU KNOW, I BELIEVE --

THE COURT: WELL, THERE ARE A NUMBER OF FACTORS THAT THE COURT LOOKS TO --

MR. SIMON: RIGHT.

THE COURT: -- NOT -- NOT ANY OF WHICH IS DISPOSITIVE. SO THERE IS A WEIGHING AND A BALANCING THAT MUST EXIST AND THAT MUST BE -- THAT MUST BE DEALT WITH. SO -- SO IT IS ONE OF FIVE FACTORS.

MR. KESSLER: HERE'S, YOUR HONOR, HOW I WILL SUM UP 'CAUSE I KNOW YOU'VE HEARD A LOT OF THIS. YOU'VE PROBABLY

1 HEARD ENOUGH.

2 IF YOU LOOK AT THE CASES, I BELIEVE YOU WILL FIND THE
3 FACTORS HERE FOR ALL THE REASONS WE ARGUE LOOK MUCH LIKE --
4 MUCH MORE LIKE DRAM WHERE AGC WAS FOUND TO BAR THE ACTION
5 BECAUSE IT WAS A TINY DRAM GOING THROUGH INTO A COMPUTER AT A
6 REMOTE LEVEL, AND JUDGE HAMILTON SAID AGC BARS, THEN IT DOES
7 LIKE LOOKING ALL THE FACTORS LIKE LCD OR CRT.

8 AND I'M QUITE CONFIDENT IF YOUR HONOR WEIGHS THOSE FACTORS
9 AND SAYS, BECAUSE IT -- IT HAS TO BE THAT SOME WEIGHING OF THE
10 FACTORS MEANS THAT YOU DENY. AND WHAT WE WOULD SUGGEST IS THE
11 TINY COST -- THE REMOTE LEVELS TOGETHER IN COMBINATION, THE
12 DIFFERENT MARKETS BETWEEN THE CELL, THE FACT THAT IT'S
13 DIFFERENT, THE WHOLE COMPLICATED CHAIN, ALL THOSE THINGS
14 TOGETHER, MAKE THIS LOOK MUCH MORE LIKE DRAM THAN THEY DO LCD.
15 AND I'D REST ON YOUR HONOR REVIEWING THAT RECORD AND MAKING
16 THAT DETERMINATION.

17 **MR. SIMON:** CAN I -- TWO QUICK POINTS.

18 NUMBER ONE, DRAM, JUDGE HAMILTON'S DECISION WAS IN THE
19 INDIRECT PURCHASER CASE, TOTALLY DIFFERENT SET OF
20 CIRCUMSTANCES THAN WHAT MR. KESSLER'S ARGUING HERE. NO DIRECT
21 PURCHASER CASE HAS HELD THE SAME IN (SIC) ANY JUDGE IN THIS
22 COURTHOUSE, AND HE CAN'T TELL YOU ONE.

23 NUMBER TWO, HE CITED THE 2008 OPINION, WELL, AFTER THE
24 CASE WAS TRIED, OUR CASE WAS TRIED, AND AFTER THE DIRECT
25 PURCHASERS WHEN -- WHO BROUGHT INDIVIDUAL ACTIONS WENT ALL THE

1 WAY TO SUMMARY JUDGMENT 2012, I WOULD HAVE THE COURT LOOK AT
2 WHAT JUDGE ILLSTON SAYS ABOUT HER OWN 2008 OPINION IN THIS
3 OPINION IN 2012.

4 AND SHE GOES -- SHE SAYS, ONE THING IS -- IS THAT IT IS
5 UNNECESSARY, QUOTING HER OWN OPINION, THE OPINION MR. KESSLER
6 WAS REFERRING TO -- IT IS, THEREFORE, UNNECESSARY FOR
7 PLAINTIFFS TO PROVIDE EVIDENCE OF A PANEL-BY-PANEL IMPACT.
8 RATHER, PLAINTIFFS MAY RESORT TO GENERALIZED METHODS OF PROOF.

9 THAT WAS ON SUMMARY JUDGMENT. HE WOULD HAVE US GO PANEL
10 BY PANEL ON THE PLEADINGS. IT'S JUST AN ABSURD STANDARD,
11 WHICH HAS NOT BEEN ACCEPTED BY ANY COURT.

12 AND LASTLY, AND I'LL END, ON OUR POWERPOINT PRESENTATION,
13 PAGES 20 AND 21, YOUR HONOR -- I ALWAYS COME BACK, WHAT DID
14 THE DEFENDANTS THINK ABOUT CELLS AND BATTERIES? WELL, LOOK AT
15 THE DOCUMENTS ON PAGES 20 AND 21 WHICH ARE ALLEGED IN THE
16 COMPLAINT, THE COMPLAINT CITATIONS ARE IN THERE. AND WHAT
17 THEY THOUGHT ABOUT CELLS AND PACKS IS THAT THEY WERE
18 INEXTRICABLY LINKED BECAUSE THESE ARE DOCUMENTS THAT TALK
19 ABOUT THE CELL PRICE GOING UP AND THE PACK PRICE GOING UP AT
20 THE SAME TIME.

21 AND THE BEST DOCUMENT IS AT THE END OF PAGE 21, WHERE THEY
22 ARE SAYING -- THIS IS MICHAEL, WHO IS AT SDI, TALKING TO
23 SOMEBODY AT LG CHEM, COMPETITORS TALKING. AND THE VERY LAST
24 BULLET POINT SAID, MICHAEL SAYS PRICES WERE RAISED TOGETHER
25 DUE TO SDI SUGGESTION OF A JOINT PACK PRICE INCREASES.

1 I WOULD SUGGEST, YOUR HONOR, THAT THE REALITY OF THIS CASE
2 BASED ON THE DOCUMENTS AND THE ALLEGATIONS IN THIS COMPLAINT,
3 THAT THE DEFENDANTS WHEN THEY CONSPIRED MADE NO DISTINCTION
4 BETWEEN CELLS AND BATTERIES.

5 **MR. KESSLER:** YOUR HONOR, IN 2000 -- I'M SORRY.

6 **THE COURT:** ONE QUESTION ABOUT THE 2012 ILLSTON -- DO
7 YOU HAVE A CITE FOR THAT?

8 **MR. SIMON:** YES, I DO. IT IS 2012 WESTLAW 586-9588.
9 AND THE SECTION STARTS AT ONE OF THE STAR NUMBERS. I THINK
10 IT'S STAR 4 AND STAR 5 YOU WANT TO LOOK AT, YOUR HONOR.

11 **THE COURT:** THANK YOU.

12 **MR. KESSLER:** YOUR HONOR, WHEN YOU READ THAT OPINION,
13 YOU'LL FIND IN 2012 THE CLASS WAS ALREADY CERTIFIED AND THE
14 ISSUE WAS HOW THEY HAD TO PROVE CLASS-WIDE IMPACT AND INJURY.
15 OF COURSE, THAT WAS NOT INDIVIDUAL AT THAT TIME WHEN THEY WERE
16 LOOKING AT THAT ISSUE.

17 THE 2008 OPINION I CITED IS PARALLEL IN PROCEDURAL CONTEXT
18 TO RIGHT NOW WHEN YOU HAVE TO LOOK PLAINTIFF BY PLAINTIFF
19 RIGHT NOW, YOUR HONOR.

20 SO I BELIEVE THAT EXPLAINS IT.

21 **THE COURT:** OKAY. ANYTHING ELSE ON THIS MOTION?

22 **MR. SIMON:** NO. THANK YOU, YOUR HONOR.

23 **MR. KESSLER:** NOTHING ELSE, YOUR HONOR. THANK YOU
24 FOR YOUR TIME ON THIS.

25 **THE COURT:** ALL RIGHT. I UNDERSTAND THAT THERE WOULD

1 LIKE -- PARTIES WOULD LIKE TO ARGUE THE INDIVIDUAL MOTIONS.
2 WE WILL BEGIN WITH GS -- I DON'T KNOW THAT I'M SAYING IT YUASA
3 CORP.?

4 **MR. GARROU:** GOOD MORNING, JUDGE.

5 **THE CLERK:** WOULD YOU JUST FOR THE COURT REPORTER
6 IDENTIFY YOURSELF.

7 **MR. GARROU:** ABOUT TO GET THERE.

8 DOUG GARROU FOR GS YUASA, AND ALONG WITH MR. PETKOSKI,
9 WE'RE MAKING OUR FIRST PRESENTATION IN THIS CASE.

10 **THE COURT:** DOUG GARROU?

11 **MR. GARROU:** GARROU, YES, MA'AM.

12 **MR. FRIEDMAN:** GOOD MORNING, YOUR HONOR. JEFF
13 FRIEDMAN FROM HAGENS BERMAN ON BEHALF OF THE INDIRECT
14 PURCHASER PLAINTIFFS.

15 WE WERE GOING TO SEGMENT THE ARGUMENTS WHERE I WILL ALSO
16 ARGUE ON A DEFENDANT-BY-DEFENDANT BASIS FOR THE DIRECTS, AS
17 WELL AS MR. SEAVER FOR THE DIRECTS WILL ARGUE FOR CERTAIN OF
18 THE DEFENDANTS.

19 (PAUSE IN THE PROCEEDINGS.)

20 **THE COURT:** MR. GARROU, WHAT LAW FIRM --

21 **MR. GARROU:** I'M SORRY?

22 **THE COURT:** YOUR LAW FIRM.

23 **MR. GARROU:** HUNTON & WILLIAMS, YOUR HONOR.

24 **THE COURT:** DID YOU SIGN IN TODAY.

25 **MR. GARROU:** EXCUSE ME?

1 **THE COURT:** DID YOU SIGN IN?

2 **MR. GARROU:** YES, YOUR HONOR. WE DID. MR. PETKOWSKY
3 AND I BOTH DID. HE WAS THE LAST NAME ON THE LIST, I THINK.
4 AND I WAS PAGE 2.

5 (OFF-THE-RECORD DISCUSSION.)

6 **THE COURT:** OH, I SEE. OKAY. I GOT IT.
7 OKAY. MR. GARROU, YOU MAY PROCEED.

8 **MR. GARROU:** THANK YOU, YOUR HONOR.

9 YOUR HONOR, THE COMPLAINTS IN THIS CASE SAY VERY LITTLE
10 ABOUT GS YUASA CORPORATION GENERALLY. THEY DO SAY ONE THING
11 QUITE IMPORTANT. THE -- THE INDIRECT PURCHASERS AT 465 AND
12 THE DIRECT PURCHASERS AT 51 BOTH SAY THAT WE WERE FORMED IN
13 APRIL 2004 AS A HOLDING COMPANY. THAT ALLEGATION DIVIDES THE
14 ANALYSIS OF THE COMPLAINT IN -- INTO TWO BUCKETS ESSENTIALLY.

15 ONE IS HAVE PLAINTIFFS PLEADED SUFFICIENT FACTS TO MAKE US
16 LIABLE FOR CONDUCT THAT OCCURRED PRIOR TO 2004, PRIOR TO
17 OUR -- OUR FORMATION, AND WE THINK THEY HAVEN'T.

18 AND THE SECOND QUESTION IS WITH THE VERY BARE ALLEGATIONS
19 THAT ARE MADE OF GS YUASA'S ACTIVITIES AFTER 2004, AFTER IT
20 CAME INTO EXISTENCE, ARE THOSE ALLEGATIONS SUFFICIENT? AND WE
21 THINK THEY'RE NOT.

22 MOVING TO THE -- THE FIRST POINT, THERE IS NO ALLEGATION
23 THAT GS YUASA IS A SUCCESSOR TO ANY ENTITY THAT ENGAGED IN ANY
24 ALLEGEDLY UNLAWFUL ACTIVITY PRIOR TO GS YUASA'S FORMATION.

25 WHAT IS PLEADED IS THAT GS YUASA WAS A HOLDING COMPANY SET

1 UP IN THE NORMAL COURSE OF BUSINESS BY TWO OTHER COMPANIES AND
2 THROUGH A -- A TRANSFER OF STOCK.

3 THE PLAINTIFFS TRY TO CAST THAT INTO SOMETHING THAT WOULD
4 GIVE LIABILITY TO GS YUASA IN TWO WAYS. THEY SAY FIRST OF
5 ALL, THAT THEY'VE PLEADED A DE FACTO MERGER IN WHICH GS YUASA
6 WOULD HAVE SOMEHOW ASSUMED LIABILITY FOR ACTIONS OF
7 CORPORATIONS EXISTING PRIOR TO THEM. THEY HAVEN'T PLEADED
8 THAT AT ALL, AND -- AND THAT'S THE SCHWARTZ CASE.

9 THEY WOULD NEED TO ACTUALLY PLEAD SOME SORT OF --
10 ESSENTIALLY A CORPORATE FRAUD, SUCH AS AN -- AN ASSET SALE
11 THAT WAS -- THAT WAS MERELY A SUBTERFUGE FOR -- FOR A
12 CORPORATE FRAUD.

13 SECONDLY, THEY CLAIM THAT THE FACT THAT THEY CALL US A
14 JOINT VENTURE PARTICIPANT IS SUFFICIENT TO MAKE US LIABLE FOR
15 THIS -- THIS PRECEDING 2004 CONDUCT. AGAIN, THAT'S -- THAT'S
16 SIMPLY NOT THE CASE. ALL THEY'VE ALLEGED IS THAT WE HAVE AN
17 OWNERSHIP INTEREST IN THE ENTITY THAT THEY SAID ENGAGED IN --
18 IN THIS BAD BEHAVIOR.

19 THE DIGITAL CASE ON VERY SIMILAR FACTS FOUND QUITE SIMPLY
20 THAT UNLESS AND UNTIL THEY MAKE ALLEGATIONS SUFFICIENT TO SHOW
21 CORPORATE DISREGARD, THAT THAT'S NOT A -- A SUFFICIENT BASIS
22 TO MAKE US LIABLE FOR THAT EARLIER CONDUCT.

23 REALLY, MOST OF THESE ARGUMENTS PARALLEL YOUR FINDINGS
24 ABOUT THE -- THE U.S. SUBSIDIARIES OF THE FOREIGN COMPANIES
25 IN -- IN YOUR PREVIOUS ORDER. IT'S THE SAME CORPORATE LAW

1 THAT APPLIES THERE.

2 NOW, MOVING TO THE -- THE POST-2004 CONDUCT, LET'S START
3 FIRST WITH THE --

4 **THE COURT:** WELL, I'M GOING TO INTERRUPT YOU.

5 MR. FRIEDMAN, WHY DON'T YOU ADDRESS THAT. THE ATCHISON
6 (PHONETIC) CASE -- I THINK I'VE SAID THAT CORRECTLY -- ONLY
7 CAME UP IN THE CONTEXT OF THE REPLY, SO I DON'T HAVE ANY
8 BRIEFING ON THAT ISSUE FROM THE PLAINTIFFS.

9 **MR. FRIEDMAN:** YOUR HONOR, SO THE SHORT ANSWER IS THE
10 WE THINK IT'S A FACTUAL ISSUE IN TERMS OF THE ACTUAL CORPORATE
11 ENTITIES AND HOW -- HOW IT WAS FORMED AND EXACTLY WHAT IS THE
12 CORPORATE STRUCTURE. WE DON'T HAVE THE DISCOVERY. WE'VE
13 GIVEN YOU OUR BEST DESCRIPTION FROM THE DOCUMENTS YOU HAVE,
14 AND --

15 **THE COURT:** SO IF I GAVE -- IF I GRANTED THE MOTION
16 WITH LEAVE TO AMEND, THERE'S NOTHING ELSE YOU COULD DO?

17 **MR. FRIEDMAN:** ON THAT BASIS, CORRECT, YOUR HONOR.

18 **THE COURT:** OKAY.

19 ANYTHING ELSE ON THAT ISSUE?

20 **MR. FRIEDMAN:** NO, YOUR HONOR.

21 **THE COURT:** NEXT?

22 **MR. GARROU:** ALL RIGHT. MOVING TO THE POST-2004
23 CONDUCT, THERE ARE EXTREMELY SPARSE ALLEGATIONS ABOUT GS
24 YUASA. I THINK THEY ARE -- THEY STAND IN DISTINCTION EVEN TO
25 THE SPARSE ALLEGATIONS MADE ABOUT CERTAIN OTHER DEFENDANTS.

1 LOOKING AT THE INDIRECT PURCHASERS' COMPLAINT, THEIR
2 OPPOSITION TO OUR MOTION CITES TWO PARAGRAPHS IN THEIR
3 COMPLAINT ONLY FOR WHAT WE DID AFTER 2004, AFTER WE CAME IN --
4 INTO BEING. THOSE ARE PARAGRAPHS 112 AND 121. AND THOSE
5 PARAGRAPHS, THE SUM TOTAL OF THOSE PARAGRAPHS, WHICH ARE
6 ESSENTIALLY IDENTICAL -- IS THAT WE MET WITH SANYO TO -- WITH
7 SAMSUNG, RATHER, TO DISCUSS CONFIDENTIAL BUSINESS MATTERS,
8 PERIOD.

9 THOSE ARE QUINTESSENTIALLY INSUFFICIENT ALLEGATIONS UNDER
10 TWOMBLY AND UNDER A HOST OF OTHER -- OF OTHER AUTHORITY.

11 WHAT HAPPENS, THEN, WITH THE DIRECT PURCHASERS IS THEY
12 TAKE THAT SAME -- IN A SAME INNOCUOUS CONDUCT, AND THEY TRY TO
13 FORCE INTO IT A CONSPIRACY NARRATIVE BY SAYING IT'S SIMILAR TO
14 THESE OTHER MEETINGS THAT THESE OTHER DEFENDANTS HAD, AND SO
15 YOU CAN JUST LUMP THEM ALL -- ALL TOGETHER.

16 WHAT I -- I WOULD CHALLENGE THE PLAINTIFFS TO SHOW YOU IN
17 THE COMPLAINT, YOUR HONOR, IS THE EVIDENCE THAT GS YUASA
18 ENTERED -- MADE A CONSCIOUS COMMITMENT TO ENTER INTO A
19 CONSPIRACY, THE EVIDENCE THAT GS YUASA EVER DISCUSSED THE
20 PRICE OF -- OF BATTERIES WITH ANYONE, WITH -- THE OUTPUT WITH
21 ANYONE.

22 **THE COURT:** MR. GARROU, YOU'RE TALKING TOO FAST FOR
23 THE COURT REPORTER.

24 **MR. GARROU:** I APOLOGIZE, YOUR HONOR. I'LL TRY TO
25 SLOW MYSELF DOWN, ALTHOUGH I THINK MY POINT IS BASICALLY MADE

1 THERE.

2 THE -- THE ALLEGATIONS ARE ONLY THAT WE MET WITH SAMSUNG.
3 NOW, IT MAY WELL BE THE CASE THAT THESE ALLEGATIONS ARE SO
4 SPARSE BECAUSE WE DON'T COMPETE WITH THESE OTHER DEFENDANTS IN
5 THE TYPES OF BATTERIES THAT THE PLAINTIFFS ARE TALKING ABOUT.
6 UNFORTUNATELY, AT -- AT THE PLEADING STAGE, WE HAVE TO LIVE IN
7 THIS -- IN THE LAND OF UNREALITY WHERE THE ALLEGATIONS ARE --
8 ARE TAKEN AS TRUE.

9 THE REASON THEY DON'T HAVE ANY EVIDENCE OF -- OF US HAVING
10 THESE CONVERSATIONS IS BECAUSE THERE'S NO REASON WE EVER
11 WOULD. BUT HOLDING THAT TO ONE SIDE, LET'S LOOK JUST AT -- AT
12 THE PLEADING ITSELF. WE HAD -- WE HAD MEETINGS WITH SAMSUNG,
13 PERIOD.

14 THEY THEN TRY TO -- THE DIRECT PURCHASERS THEN TRY TO
15 CHARACTERIZE THOSE MEETINGS AS FITTING INTO THEIR NARRATIVE
16 BUT WITHOUT EVER GIVING ANY CONTENT TO WHAT WAS ACTUALLY DONE
17 OR SAID BY GS YUASA. WE ARE AN OUTLIER. WE ARE NOT A -- A
18 PROPER DEFENDANT IN THIS CASE, AND FOR THAT REASON, THEY
19 CANNOT MAKE DETAILED FACTUAL ALLEGATIONS SUFFICIENT IN EVEN
20 THE BAREST SENSE UNDER TWOMBLY.

21 **THE COURT:** MR. FRIEDMAN.

22 **MR. FRIEDMAN:** YOUR HONOR, FIRST, MAY I HAND TO THE
23 COURTROOM DEPUTY THREE COPIES OF -- SUBMISSION FOR THE COURT?

24 (PAUSE IN THE PROCEEDINGS.)

25 **MR. FRIEDMAN:** YOUR HONOR, THE FIRST THING WE HAD IS

1 WE WANTED TO CONDENSE AND FOCUS THE COURT WHEN IT GOES BACK
2 AND ANALYZES THE ISSUES BY PROVIDING THE SPECIFIC PARAGRAPH
3 REFERENCES, BOTH THE DIRECTS AND INDIRECT PURCHASERS RELY ON
4 IN THEIR COMPLAINTS IN ORDER SO THAT THE COURT DOES NOT HAVE
5 TO GO SEARCHING THROUGH THE COMPLAINT OR FOR THE PAPERS. SO
6 THAT -- SO WE'VE PROVIDED THAT TO THE COURT.

7 **THE COURT:** IT'S ALWAYS APPRECIATED.

8 **MR. FRIEDMAN:** SO, YOUR HONOR, I'D LIKE TO MAKE A --
9 A GENERAL POINT FIRST THAT WILL APPLY THROUGHOUT AS TO -- AS
10 EACH ONE OF THE DEFENDANTS STANDS UP BEFORE YOU AND TRIES TO
11 ARGUE ON A PARAGRAPH-BY-PARAGRAPH BASIS WHY YOU SHOULD DISMISS
12 THE COMPLAINT AGAINST THEM.

13 AND THEN I WILL DEAL DIRECTLY WITH YUASA AND WHOMEVER
14 WANTS TO COME, IF THE COURT WANTS TO GO PARAGRAPH BY PARAGRAPH
15 IN RESPONSE. BUT I'M DOING THIS TO TRY AND USE THE COURT'S
16 TIME EFFICIENTLY.

17 THE COURT HIT CORRECTLY THE NAIL RIGHT ON THE HEAD IN
18 RESPONSE TO MR. KESSLER WHEN THE COURT SAID, LOOK, WE'RE AT
19 THE PLEADING STAGE. AND THE FACT OF THE MATTER IS WE'RE
20 LOOKING AT PLAUSIBILITY. AND THE IDEA -- AND IN ITS -- IN THE
21 COURT'S ORDER ON PAGE 20, I BELIEVE, YOU REMARKED THAT AT THIS
22 STAGE -- AND EVEN AT TRIAL, YOUR HONOR -- WE'RE NOT REQUIRED
23 TO PROVE BACK-ROOM MEETINGS AND DISCUSSIONS THAT HAPPENED IN
24 BACK-ROOM MEETINGS.

25 SO EVEN WHEN WE GET TO THE TRIAL STAGE, YOUR HONOR, WE'RE

1 NOT REQUIRED TO PROVE IT, LET ALONE ALLEGE IT AT THIS STAGE.

2 SO WHAT WE HAVE IS THE INTERPLAY BETWEEN NOTICE PLEADING
3 UNDER RULE 8. WE HAVE TWOMBLY THAT SAYS THERE NEEDS TO BE
4 SOMETHING BEYOND BARE-NAKED ALLEGATIONS, BARE BONES. AND THEN
5 WE HAVE THE THIRD OPERATIVE PRINCIPLE AT PLAY, WHICH IS
6 CONSPIRACY LAW. AND THIS IS (SIC) THE THREE FACTORS THAT WILL
7 RUN THROUGHOUT, NOT JUST ALLEGATIONS IN THE COMPLAINTS BUT
8 SUMMARY JUDGMENT AND TRIAL HERE, EXCEPT FOR THE TWOMBLY PART
9 AND THE NOTICE PART, BUT PARTICULARLY THE CONSPIRACY PART.

10 AND SO WE HAVE ON ONE END OF THE SPECTRUM, YOUR HONOR,
11 THIS NOTION THAT THERE'S NOTICE PLEADING, AND THEN YOU HAVE
12 OVERARCHING ON THAT IS THE SUPREME COURT SAYING, YOUR HONOR,
13 YOU NEED TO LOOK AT SOME FACTUAL MATERIAL THAT NUDGES THE
14 COMPLAINT TO PLAUSIBLE.

15 AND THE COURT NOTED IT'S NOT A PROBABLE TEST. IT'S
16 WHETHER OR NOT THE COURT, USING THE CONTEXT WHICH WE'VE (SIC)
17 PROVIDE WITH FACTS, ALLOWS FAIR INFERENCES. SO HERE'S WHAT I
18 WOULD SAY IN TERMS OF THE CONSPIRACY LAW, AND THIS IS WHAT --
19 THIS IS GOING TO RUN THROUGHOUT THEIR ARGUMENTS.

20 THE STANDARD DOES NOT REQUIRE US UNDER A CONSCIOUS
21 COMMITMENT TO A COMMON SCHEME OR PLAN TO PROVE EXPRESS
22 AGREEMENTS. IT DOES NOT REQUIRE US TO PROVE THAT THERE WAS
23 ANY STATEMENTS MADE, IN FACT. IT CAN BE CONDUCT ALONE TO
24 DEMONSTRATE PARTICIPATION.

25 AND THAT'S WHAT WE'RE ANALYZING HERE TODAY, IS HAVE WE

1 ALLEGED FACTS THAT INFER PARTICIPATION? WE CAN INFER
2 PARTICIPATION FROM STATEMENTS, FROM CONTEXT, FROM CONDUCT, AND
3 SO ALL OF THOSE THINGS, YOUR HONOR, WE'RE ALLOWED TO POINT TO
4 AT THE PLEADING STAGE TO SAY, WE MAY INFER A TACIT
5 UNDERSTANDING THAT AN ILLICIT AGREEMENT EXISTED THAT THEY
6 PARTICIPATED IN.

7 SO WHAT I WOULD SAY TO YOUR HONOR IS WITH THAT BACKDROP,
8 IT'S IMPORTANT, THEN, FOR US TO THEN LOOK AT EACH ONE OF THE
9 DEFENDANTS. AND WE, IN FACT, DROPPED ONE DEFENDANT WHERE WE
10 HAD NO OBJECTIVE OBSERVABLE FACT FROM WHICH TO INFER
11 PARTICIPATION. EVERY OTHER DEFENDANT THAT'S GOING TO GET UP
12 HERE TODAY, WE HAVE AN OBJECTIVE OBSERVABLE FACT TO INFER
13 PARTICIPATION.

14 NOW, HERE'S THE INTERPLAY, FIRST OF ALL, WITH WHAT
15 COUNSEL'S SAYING. NOW, THE RELEVANCE HERE, YOUR HONOR, IN
16 TERMS OF THEIR ATTEMPT TO BIFURCATE THE 2004 AWAY FROM
17 ANYTHING AFTER THE 2004 PERIOD COMES SORT OF IN TWO
18 DIMENSIONS.

19 THE FIRST DIMENSION IS THEY DON'T WANT YOU -- OR THEY WANT
20 YOU TO MINIMIZE THE INFERENCES THAT YOU CAN DRAW FROM, FOR
21 EXAMPLE, ALLEGATION IN PARAGRAPH 57, YOUR HONOR, OF THE
22 INDIRECT PURCHASER COMPLAINT.

23 IN PARAGRAPH 57 OF THE IN- -- THE INDIRECT PURCHASERS
24 COMPLAINT, WHICH IS A PRE-2004 EVENT, IS WHERE A YUASA
25 INDIVIDUAL -- THERE IS A REFLECTION OF MEETINGS IN WHICH YUASA

1 AND SDI -- WHICH IS WHERE WE GET A LOT OF THE INCRIMINATING
2 DOCUMENTS FROM, IS FROM SDI, YOUR HONOR -- RECOUNT THAT THE
3 PARTIES DISCUSSED THE IDEA -- QUOTE, THE IDEA THAT THE TWO
4 COMPANIES CAN WIN/WIN AS LONG AS WE MAINTAIN COOPERATION, NOT
5 THE COMPETITION.

6 SO YOU HAVE YUASA PARTICIPATING CLEARLY WHERE WE HAVE
7 OBJECTIVE FACTS AND STATEMENTS OF COOPERATION. AND WHAT THEY
8 WANT YOU TO DO IS SAY, WELL, EVEN THOUGH THERE'S SOME YUASA
9 EMPLOYEE THAT'S PARTICIPATING, WHEN YUASA CHANGES AND MORPHS
10 ITS CORPORATE STRUCTURE, THAT WHEN A YUASA EMPLOYEE IN 2006
11 AND 2007 IS MEETING WITH THE CONSPIRATORS, THEY'RE
12 COMPETITORS, AND HAVING CONFIDENTIAL COMMUNICATIONS, THAT YOU
13 MAY NOT INFER THAT THIS IS A CONTINUATION OF THE TYPE OF
14 DISCUSSIONS THAT WERE GOING ON THAT PREDATED 2004.

15 AND SO WHAT I'D SAY TO YOUR HONOR IS THAT YOU HAVE THAT
16 INFORMATION CONTEXTUALLY, WHICH WE THINK GIVES US AN
17 INFERENCE -- ALLOWABLE INFERENCE AT THIS STAGE THAT WHEN YUASA
18 IS MEETING WITH A CONSPIRATOR IN THE FOLLOWING CONTEXT: IT
19 WAS MEETINGS IN WHICH SDI, SAMSUNG, IS GOING TO JAPAN IN
20 AUGUST OF 2006 AND MEETING SEQUENTIALLY WITH ITS COMPETITORS
21 AND HAVING DETAILED EXCHANGE OF INFORMATION ABOUT PRICING
22 CAPACITY, FUTURE PLANS, WHICH THE COURT RECOGNIZED IN THIS
23 CONTEXT, CLEARLY THERE'S AN INFERENCE THAT THOSE DISCUSSIONS
24 ARE IN FURTHERANCE OF THE OBJECTIVE TO ELEVATE PRICES.

25 SO WE'RE NOT TALKING ABOUT A FREE-STANDING MEETING THAT

1 YUASA HAS WITH SAMSUNG THAT'S UNTETHERED TO ANY CONTEXT HERE.
2 AND WE'RE NOT TALKING ABOUT THIS OUTLIER THAT WE ONLY HAVE ONE
3 INCIDENCE WHERE WE DON'T HAVE THE SPECIFIC DETAILED NOTES OF
4 EXACTLY WHAT WAS SAID ON A TAPE-RECORDING.

5 BUT, INSTEAD, WHAT WE HAVE, YOUR HONOR, IS CONTEXTUALLY
6 DETAILED CONSPIRATORIAL NEGOTIATIONS THAT WERE NOTED PRE-2004
7 BY A YUASA EMPLOYEE, A MORPHING OF ENTITY THAT OCCURS, AND
8 THEN A CONTINUATION OF THESE SEQUENTIAL MEETINGS BACK TO BACK
9 TO BACK AMONGST THE CONSPIRATORS THAT ARE CLEARLY GOING ON IN
10 THE CONTEXT OF CARRYING OUT THE CONSPIRACY.

11 AND SO -- I'M ABOUT TO FINISH, YOUR HONOR. I WOULD ONLY
12 SAY THAT IN THIS CONTEXT, AT THE PLEADING STAGE, WE CERTAINLY
13 HAVE GONE PAST BARE CONCLUSORY ALLEGATIONS. THERE'S -- THIS
14 CAN BE NO DISPUTE ABOUT THAT. AND THE FACT THAT WE'RE NOW
15 ARGUING BY DEFINITION INFERENCES DRAWN FROM THE FACTS THAT WE
16 ALLEGE, WE THINK JUST BY DEFINITION AT THAT POINT IN TIME,
17 YOUR HONOR, WE GET TO PLAUSIBILITY, AND WE MEET THE STANDARD.

18 BUT I'D EVEN GO ONE STEP FURTHER, AND THAT IS TO SAY THAT
19 EVEN WHEN YOU START TALKING ABOUT THE INFERENCES THAT CAN BE
20 DRAWN, THAT WE'RE NOW TALKING ABOUT SUCH SPECIFICITY THAT
21 WE'RE GOING BEYOND THE CONSPIRACY STANDARD FOR SUMMARY
22 JUDGMENT AND TRIAL, AND THAT THE CONSCIOUS COMMITMENT IS ONE
23 IN WHICH WE'RE TALKING ABOUT THE MENS REA. AND MENS REA AT
24 TRIAL WE WILL BE ALLOWED TO PROVE EVEN IF IT WAS PURELY A
25 TACIT UNDERSTANDING DEMONSTRATED BY CONDUCT.

1 AND SO --

2 **THE COURT:** BUT IT HAS TO BE -- THAT IS, LET'S --
3 LET'S LOOK AT YOUR ALLEGATIONS.

4 **MR. FRIEDMAN:** SURE, YOUR HONOR.

5 **THE COURT:** THE INDIVIDUAL WHO'S AT ISSUE WHO HAD THE
6 MEETING, WHO IS THAT PERSON?

7 **MR. FRIEDMAN:** WHO HAD THE MEETING IN -- BEFORE 2004?

8 **THE COURT:** FOR THE -- I WAS LOOKING AT 54. I DIDN'T
9 SEE --

10 **MR. FRIEDMAN:** AT 54 OR 57, YOUR HONOR?

11 (PAUSE IN THE PROCEEDINGS.)

12 **MR. FRIEDMAN:** SO IF YOU LOOK AT 56, YOUR HONOR,
13 PARAGRAPH 56, THE INDIRECT PURCHASER COMPLAINT --

14 (PAUSE IN THE PROCEEDINGS.)

15 **MR. FRIEDMAN:** TELL ME WHEN THE COURT'S --

16 **THE COURT:** NO, I HAD ACTUALLY THE WRONG COMPLAINT
17 OPEN. OKAY. NOW I'M SEEING IT.

18 **MR. FRIEDMAN:** OKAY. SO AT 56, YOUR HONOR, WE DETAIL
19 DATE, THAT THIS MEETING OCCURRED AT THE YUASA ODAWARA FACTORY
20 IN JAPAN. WE DETAIL THAT -- HERE'S THE SAMSUNG EMPLOYEES. WE
21 DETAIL THE YUASA EMPLOYEES, YOUR HONOR. AND THAT -- AND THAT
22 IS IN THE CONTEXT OF, THEN, ALSO PARAGRAPH 57, WHICH DETAILS
23 THE DISCUSSION -- AT LEAST PART OF THE DISCUSSIONS. WE DON'T,
24 OF COURSE, KNOW ALL OF THE DISCUSSIONS THAT IS GOING ON.

25 AND WHERE WE HAVE NOTATIONS OF SOME OF THE DISCUSSIONS

1 WHICH WE BELIEVE STRONGLY SUPPORT THE FACT THAT THERE WERE
2 COLLUSIVE DISCUSSIONS GOING ON.

3 NOW, SAMSUNG, YOUR HONOR, AS WE SAID, IS ALL OVER THE
4 DOCUMENTS, JUST LIKE LG IS ALL OVER THE DOCUMENTS NOTING
5 COLLUSIVE DISCUSSIONS. AND SO WHAT I'M SAYING, YOUR HONOR, IS
6 THAT WE HAVE THIS CONTEXT THAT IS SPECIFICITY BEYOND WHAT WE
7 THINK WE OBVIOUSLY NEED AT THIS POINT, BUT WE'VE PLED IT.

8 AND THEN WHAT WE HAVE, YOUR HONOR, IS LATER MEETINGS THAT
9 ARE OCCURRING THAT WE'RE DETAILING FOR YOU. ALSO WITH THE
10 YUASA ENTITY THAT'S IN THE CONTEXT OF SDI MAKING ITS ROUND
11 TRIPS TO DISCUSS COLLUSIVE ACTIONS WITH THEIR COMPETITORS.
12 AND IN THE MIDDLE OF THIS THREE-TO-FOUR-DAY MEETING THAT'S
13 GOING ON, I BELIEVE, IN AUGUST OF 2006 -- MEETINGS -- THEY'RE
14 MEETING WITH YUASA.

15 **THE COURT:** THERE IS A INDICATION BY MR. GARROU THAT
16 THERE WAS NO -- THAT THEY'RE NOT -- THAT THEY'RE NOT
17 COMPETING. THEY'RE NOT IN -- I SEE HERE THE REFERENCE TO
18 DIFFERENT KINDS OF BATTERIES. WE -- WHAT IS THE PERSPECTIVE
19 ON THAT ISSUE?

20 **MR. FRIEDMAN:** WELL, FIRST OF ALL, YOUR HONOR,
21 GETTING AN ARGUMENT WHETHER OR NOT THEY'RE COMPETING OR NOT, I
22 DON'T THINK IS AT THIS POINT TO BE RESOLVED. THAT'S ONE.

23 NUMBER TWO --

24 **THE COURT:** I UNDERSTAND THAT. I JUST -- I'M LOOKING
25 FOR THE REFERENCE TO THIS COMPANY PRODUCING LITHIUM ION

1 BATTERIES OR BATTERY CELLS OR SOMETHING TO THAT EFFECT.

2 **MR. FRIEDMAN:** SO IF -- IF THE ARGUMENT, YOUR HONOR,
3 IS THEY WERE NOT IN THE LITHIUM ION BATTERY BUSINESS, I'M
4 HAPPY TO PROVIDE -- I DON'T HAVE SPECIFIC PIN CITES FOR YOU.
5 I'M HAPPY TO GO AND LOOK AT PIN CITES IF WE MAKE THAT
6 ALLEGATION.

7 I CAN TELL YOU THAT WE CERTAINLY HAVE -- I DON'T WANT TO
8 SAY THINGS THAT ARE OUTSIDE THE COMPLAINT, YOUR HONOR, SO
9 THAT'S WHY I DON'T KNOW FOR CERTAIN.

10 **THE COURT:** SO YOU DON'T KNOW IF THAT ALLEGATION IS
11 IN THE COMPLAINT.

12 **MR. FRIEDMAN:** WHETHER THEY'RE AT ALL INVOLVED IN THE
13 LITHIUM ION BUSINESS?

14 **THE COURT:** YES.

15 **MR. FRIEDMAN:** I DON'T HAVE THE PIN CITE, AND I DON'T
16 KNOW SPECIFICALLY SO WE WILL LOOK.

17 **THE COURT:** MR. SEAYER, DO YOU KNOW?

18 (SIMULTANEOUS COLLOQUY.)

19 **MR. GARROU:** AND, JUDGE, I MAY BE ABLE TO -- I HAVE
20 SOME KNOWLEDGE ON THIS AREA. WE MAY BE ABLE TO SHORT CIRCUIT
21 THIS. GS YUASA DOES NOT MAKE THE TYPES OF LITHIUM ION
22 BATTERIES THAT, FOR EXAMPLE, THE PLAINTIFFS JUST SERVED US
23 DISCOVERY ON. WE MAKE LARGE LITHIUM ION BATTERIES FOR
24 SPECIALTY APPLICATIONS -- OUR SUBSIDIARIES MAKE LARGE LITHIUM
25 ION BATTERIES FOR SPECIALTY APPLICATIONS LIKE SATELLITES AND

1 AIRCRAFT.

2 THEY'RE -- I MEAN, THEY'RE LITERALLY THE SIZE OF CASE
3 BOOKS IN -- IN MANY INSTANCES. I AGREE THAT THAT'S OUTSIDE
4 THE PLEADINGS. MY MESSAGE FOR THE COURT, THOUGH, IS THAT FACT
5 IS WHAT IS INFORMING THE PLEADINGS. IT IS THAT FACT THAT
6 CAUSES THE PLAINTIFFS SUCH DIFFICULTY IN DESCRIBING WHAT IT
7 WAS WE DID TO JOIN THIS CONSPIRACY. THAT'S -- THAT'S THE
8 BACKDROP FOR WHAT'S HAPPENING HERE.

9 SO WE ARE ESSENTIALLY -- WE'RE IN A FICTIONAL WORLD, BUT
10 I'M -- I'M READY TO LIVE IN THAT FICTIONAL WORLD, AND I -- I'D
11 LIKE TO RESPOND JUST BRIEFLY --

12 **MR. FRIEDMAN:** WELL --

13 **MR. GARROU:** -- IF I COULD, TO WHAT'S BEEN SAID.

14 **THE COURT:** LET ME -- LET ME -- CAN YOU FINISH OFF
15 WHAT YOUR -- BECAUSE I UNDERSTAND, MR. FRIEDMAN, WHAT YOU'RE
16 SAYING IN TERMS OF ALL OF THE VARIOUS DEFENDANTS GLOBALLY, BIG
17 PICTURE. AND I -- AND I WILL TAKE YOUR COMMENTS WITH RESPECT
18 TO THIS ARGUMENT AND APPLY THEM ACROSS THE BOARD.

19 BUT WITH RESPECT TO THIS PARTICULAR DEFENDANT, I AM TRYING
20 TO UNDERSTAND THE THEORY SPECIFICALLY TO THE CONSPIRACY THAT'S
21 ALLEGED HERE IN 200 PAGES.

22 **MR. FRIEDMAN:** SO -- SO, YOUR HONOR, I WANTED TO -- I
23 WANT TO NOT STAND ON FORMALITY 'CAUSE I THINK THE COURT'S VERY
24 PRAGMATIC, AND I DON'T LIKE WASTING -- AND BEING INEFFICIENT.
25 SO I APPRECIATE THAT COUNSEL MAKES STATEMENTS OUTSIDE THE

1 COMPLAINT JUST LIKE I WILL NOW DO.

2 SO WE HAVE NOTES WITHIN THE VERY NOTES THAT WE ALLEGE IN
3 THE COMPLAINT SO WE REFERENCE -- THIS IS FROM THE MEETINGS --
4 IN WHICH I AGREE THAT YUASA PRIMARILY WAS DEALING IN NICKEL
5 BATTERIES AND OTHERWISE.

6 **MR. GARROU:** JUDGE, WE NEED TO BE CAREFUL IN THE USE
7 OF THE WORD "YUASA" HERE. IT IS A COMMON JAPANESE NAME. IT
8 WAS THE NAME OF YUASA CORPORATION. YUASA CORPORATION WAS ONE
9 OF THE ENTITIES THAT FORMED GS YUASA, AS THE PLAINTIFFS
10 THEMSELVES SAY, AS A NEW COMPANY IN APRIL OF 2004.

11 **MR. FRIEDMAN:** SO --

12 (SIMULTANEOUS COLLOQUY.)

13 **MR. GARROU:** -- STOP -- BEFORE 2004 IS NEITHER HERE
14 NOR THERE.

15 **MR. FRIEDMAN:** THIS IS 2006, YOUR HONOR, GS YUASA
16 DURING THE AUGUST MEETINGS THAT WE'RE TALKING ABOUT, SO WE CAN
17 BE CLEAR, ALL RIGHT, SO WE'RE TALKING ABOUT THE ENTITY ON THE
18 COMPLAINT. AND WE HAVE THE NOTES. AND THE NOTES INCLUDE A
19 COMMENT THAT THERE'S A GS YUASA AT LEAST A 45 PERCENT
20 INVESTMENT IN SANYO GS, A JAPANESE BATTERY MAKER, SO IT IS
21 SAID TO CONDUCT THE LITHIUM ION BATTERY BUSINESS. THAT IS
22 REFERRING TO GS YUASA.

23 THERE'S ALSO FURTHER NOTES WHERE IN THIS SAME 2006-2007
24 TIME PERIOD, THERE'S DISCUSSION OF GS YUASA MAKING A MOVE INTO
25 LITHIUM ION BATTERIES FOR POWER TOOLS, WHICH ARE PRODUCTS

1 ALLEGED IN THE INDIRECT PURCHASER COMPLAINT.

2 AND SO WE HAVE BOTH A REFERENCE TO THE FACT -- THEY ARE
3 SELF-REFERENCING THEIR PARTICIPATION IN THE LITHIUM ION
4 BATTERY BUSINESS, AS WELL AS MOVING INTO THE LITHIUM ION
5 BATTERY BUSINESS. DID THEY OR DID THEY NOT? TO WHAT EXTENT
6 TO, YOUR HONOR? THIS IS GOES BACK TO MY OVERALL POINT.

7 **THE COURT:** SO WHAT I HEAR YOU SAYING IS THAT YOU
8 COULD AMEND THE COMPLAINT TO MAKE THOSE EXPLICIT REFERENCES,
9 THOSE EXPLICIT REFERENCES DO NOT CURRENTLY EXIST IN THE
10 COMPLAINT.

11 **MR. FRIEDMAN:** I CAN TELL YOU -- CORRECT. CORRECT.
12 AND I'D ALSO REFER YOU TO PARAGRAPH 51 OF THE DIRECT PURCHASER
13 COMPLAINT, IS WHERE THEIR ALLEGATIONS ARE FOR THE YUASA
14 PARTICIPATION IN LITHIUM ION INDUSTRY.

15 **THE COURT:** 51? THAT'S NOT ON YOUR CHART.

16 **MR. FRIEDMAN:** IT IS NOT BECAUSE WE WERE TRYING TO
17 FOCUS YOU ON INFERENCES OF CONSPIRATORIAL ACTIVITY, OPPOSED TO
18 WHETHER THEY WERE AT ALL INVOLVED IN THE BUSINESS, WHICH IS
19 WHAT I THINK COUNSEL'S ARGUMENT IS, IS THEY WEREN'T EVEN
20 INVOLVED IN LITHIUM ION BATTERIES.

21 **MR. GARROU:** I DID -- I DID NOT SAY THAT --

22 **MR. FRIEDMAN:** OH.

23 **MR. GARROU:** WE --

24 **THE COURT:** ALL RIGHT. I HAVE MORE CLARIFICATION.

25 OKAY.

1 NEXT ISSUE. ANYTHING ELSE?

2 MR. GARROU: JUDGE, I THINK I'VE COVERED WHAT I HAD
3 TO SAY. THE -- THE IMPORTANT POINT ABOUT THE PRE-2004
4 CONDUCT, HOWEVER, IS THAT WE'VE NOW HEARD THREE THINGS FROM
5 PLAINTIFFS ABOUT WHY WE'RE RESPONSIBLE FOR IT.

6 THEY TOLD US THAT WE'RE RESPONSIBLE BECAUSE WE OWNED A
7 JOINT VENTURE, PART OF A JOINT VENTURE, WHICH WE DID. SANYO
8 GS SOFT ENERGY, CORRECT. WE HAD A MINORITY STAKE IN THAT
9 VENTURE. AND WE CITED YOU THE CASES, INCLUDING DIGITAL, THAT
10 SHOW WHY THAT DOESN'T GENERATE LIABILITY FOR US.

11 THEY'VE SAID THAT THERE WAS A DE FACTO MERGER. THEY'VE
12 ALLEGED NO FACTS TO SUPPORT THAT. AND, IN FACT, WHAT THEY DO
13 ALLEGE IS TOTALLY CONTRARY TO SOME ILLEGAL CORPORATE
14 SHENANIGANS.

15 FINALLY, WE'RE HEARING THE WORD "MORPHED." YUASA MORPHED
16 INTO GS YUASA, INC. I DON'T KNOW WHAT THAT MEANS. IT
17 CERTAINLY ISN'T PLEADED. THERE IS NO BASIS IN THIS COMPLAINT
18 TO HOLD US LIABLE FOR ACTIONS TAKEN BEFORE WE WERE
19 INCORPORATED. THEY DO NOT USE THE WORD "SUCCESSOR." THEY
20 DON'T USE THE WORD "MERGE." THEY DON'T SAY ANYTHING LIKE
21 THAT. THEY SAY THAT WE CAME INTO BEING IN 2004.

22 FOR THE POST-2004 CONDUCT, YOU KNOW, THE -- IF I WERE
23 ARGUING THEIR SIDE OF THIS MOTION, I WOULD ALSO WANT TO GROUP
24 US IN WITH THE OTHER DEFENDANTS, AND I -- I WOULD ALSO WANT
25 TO, YOU KNOW, PUSH THE TIME PERIODS TOGETHER.

1 THE FACT IS 112 AND 121 ARE THE ONLY ALLEGATIONS OF WHAT
2 WE DID IN THE INDIRECT PURCHASER COMPLAINT, AND THEY ARE
3 INNOCUOUS CONDUCT. AND -- AND THERE IS -- I THINK YOU WILL
4 SEARCH THE COMPLAINT IN VAIN FOR ANY STATEMENT OF -- OR ANY
5 ACTION OR ANY REFERENCE, ANY ELLIPTICAL REFERENCE TO A GS
6 YUASA ACTION OR STATEMENT THAT EVIDENCED ANYTHING LIKE JOINING
7 THIS CONSPIRACY.

8 AND THERE ARE REASONS FOR THAT.

9 MR. FRIEDMAN: YOUR -- YOUR HONOR, VERY BRIEFLY,
10 'CAUSE I THINK MR. GARROU SKIPPED OVER A SIGNIFICANT POINT
11 THAT WE DO ARGUE, AND I UNDERSTAND WHY HE DID. BUT, YOUR
12 HONOR, UNDER -- BACK TO THE 310 POST. UNDER CONSPIRACY LAW,
13 YOUR HONOR, THEY'RE LIABLE FOR -- IF YOU GO AND JOIN A
14 CONSPIRACY, YOU'RE LIABLE FOR THE ACTS OF THE CONSPIRACY. AND
15 THE ONE CAVEAT TO THAT, YOUR HONOR, IS IF THEY WERE TO AT SOME
16 POINT DOWN THE ROAD, MAKE THE ARGUMENT THERE'S CASE LAW THAT
17 SAYS, WELL, DEFENDANT CAN TURN AROUND AND ARGUE, WELL, WE'RE
18 ONLY LIABLE TO THE EXTENT WE HAD REASON TO BELIEVE OF SOME OF
19 THE PRIOR CONDUCT.

20 WELL, YOUR HONOR, WE ALLEGE PARAGRAPHS OF EMPLOYEES AND
21 THAT WE WILL GO AND FIND OUT IF THESE EMPLOYEES IN 2000,
22 ET CETERA, WERE -- CONTINUED ON IN THEIR EMPLOYMENT WITH THE
23 MORPHED COMPANY OR NOT. THESE ARE ALL ARGUMENTS THAT WILL BE
24 RIPE FOR THEM TO MAKE, TO TRY AND SAY, WELL, MAYBE THERE'S
25 EVIDENCE WE DID JOIN IN 2006 AND 2007, BUT WE SHOULD BE CUT

1 OFF FROM LIABILITY FOR OUR CONDUCT IN 2000 AND 2002 BECAUSE NO
2 ONE AT GS YUASA IS KNOWLEDGEABLE OR HAD REASON TO BELIEVE OF
3 CONSPIRATORIAL ACTS PRIOR TO THE DATE THEY JOINED.

4 AND WE'LL HEAR THAT ARGUMENT.

5 **MR. GARROU:** JUDGE, THESE ARGUMENTS ARE ONLY RELEVANT
6 IF THEY WOULD ALLEGE THAT WE JOINED THE CONSPIRACY. THEY
7 DON'T MAKE THAT ALLEGATION. THERE IS NO SUFFICIENT ALLEGATION
8 UNDER TWOMBLY THAT WE PARTICIPATED IN THIS CONSPIRACY AT ANY
9 POINT.

10 **THE COURT:** NEXT --

11 **MR. GARROU:** THANK YOU, JUDGE.

12 **MR. FRIEDMAN:** WHO WOULD YOU LIKE NEXT, YOUR HONOR?

13 **THE COURT:** NEXT WILL BE HITACHI MAXELL CORPORATION.

14 (PAUSE IN THE PROCEEDINGS.)

15 **THE COURT:** SIR.

16 **MR. SEEBALD:** GOOD MORNING. CRAIG SEEBALD OF
17 VINSON & ELKINS FOR MAXELL CORPORATION OF AMERICA.

18 **MR. SEEVER:** AND TODD SEEVER FROM BERMAN DE VALERIO
19 ON BEHALF OF THE DIRECT PURCHASER PLAINTIFFS. AND AS
20 MR. FRIEDMAN MENTIONED EARLIER, I'LL ALSO BE ADDRESSING
21 ARGUMENTS ON BEHALF OF THE INDIRECT PURCHASER PLAINTIFFS ON
22 THIS MOTION.

23 **MR. SEEBALD:** YOUR HONOR HAD PREVIOUSLY DISMISSED
24 MAXELL CORPORATION AMERICA, WHICH IS THE U.S. SALES SUBSIDIARY
25 OF HITACHI MAXELL, LIMITED. PLAINTIFFS RE-PLIED, AND THE

1 SIMPLE FACT IS THEY HAVE NOT SUFFICIENTLY ALLEGED A NEXUS
2 TYING MAXELL CORPORATION OF AMERICA TO THE CONDUCT IN THIS
3 COMPLAINT. THERE'S JUST VERY, VERY LITTLE IN TERMS OF
4 ALLEGATIONS TO DISCUSS, SO WE CAN KEEP THIS SHORT.

5 PLAINTIFFS TRY TO OBSCURE THE ISSUE AND SAY, OH, YOU HAVE
6 TO TAKE A HOLISTIC VIEW OF THE COMPLAINT TO UNDERSTAND WHY
7 MAXELL CORPORATION OF AMERICA SHOULD BE IN THIS CASE.

8 THE SIMPLE FACT IS THERE'S JUST A LOT OF HOLES IN THE
9 PLAINTIFFS' HOLISTIC THEORY.

10 **THE COURT:** WELL, YOU DON'T AGREE THAT I HAVE TO TAKE
11 HOLISTIC --

12 (SIMULTANEOUS COLLOQUY.)

13 **MR. SEEBALD:** -- I DON'T DISAGREE, AND YOU MADE THAT
14 VERY CLEAR IN YOUR FIRST ORDER. I GUESS MY WHOLE POINT IS
15 THERE'S LIMIT -- THERE'S THREE THINGS IN PARTICULAR THAT I
16 THINK ARE HOLES IN THEIR APPROACH. ONE IS YOU SAID VERY
17 CLEARLY THAT THEY HAVE TO SHOW THAT THERE WAS SOME KIND OF
18 CONSCIOUSNESS IN TERMS OF JOINING THIS CONSPIRACY.

19 AND LOOKING AT THIS ENTIRE COMPLAINT, WE JUST DON'T SEE
20 THAT AT ALL. NONE OF THE THINGS THAT THEY ALLEGE GET TO THAT.
21 THE ONE THING THAT THEY ALLEGE IS THAT THERE'S A 2010 EMAIL
22 WHERE -- SOMEONE AT THE COMPANY ALLEGEDLY RECEIVED. I DON'T
23 THINK GETTING A COPY OF AN EMAIL IN 2010 IS SUFFICIENT
24 ALLEGATIONS TO TIE MAXELL CORPORATION OF AMERICA TO THIS
25 CONSPIRACY.

1 ANOTHER THEORY OF THEIRS IN THIS HOLISTIC APPROACH THAT
2 JUST DOESN'T WORK HERE IS THAT THEY SAY, WELL, OTHER U.S.
3 SUBSIDIARIES OF OTHER DEFENDANTS CONSPIRED, YOU SO MUST HAVE.

4 WELL, THAT JUST DIDN'T WORK HERE. I MEAN, YOU HAVE TO
5 IN -- YOUR PRIOR ORDER SAID THAT YOU HAD TO SHOW, YOU KNOW,
6 CONSCIOUS DECISION. WELL, IT'S NOT A CONSCIOUS DECISION TO
7 JOIN A CONSPIRACY IF YOUR ONLY EVIDENCE IS THAT ALLEGEDLY
8 OTHERS IN THE INDUSTRY JOINED.

9 AND THEN LASTLY, THE PLAINTIFFS DO THE GAME OF DEFINING
10 MAXELL VERY LOOSELY. THEY SAY, OH, HITACHI MAXELL, MAXELL
11 CORPORATION OF AMERICA, WHAT'S THE DIFFERENCE? WE'LL JUST TRY
12 TO ALL PAINT IT AS MAXELL. WELL, AS JUDGE ILLSTON MAKES CLEAR
13 THE LCD AND SEVERAL OTHER COURTS MAKE CLEAR, YOU CAN'T DO
14 THAT. YOU HAVE TO HAVE SPECIFIC ALLEGATIONS AS TO THE
15 DEFENDANT, AND THERE'S JUST NOTHING IN THIS COMPLAINT THAT
16 SHOULD CHANGE THE PRIOR DECISION. THERE'S JUST NOTHING THAT
17 TIES MAXELL CORPORATION OF AMERICA, THE U.S. SALES SUBSIDIARY,
18 TO THIS -- TO THIS CONSPIRACY.

19 **THE COURT:** ALL RIGHT. MR. SEAVER?

20 **MR. SEAVER:** GOOD MORNING. THE -- YOUR HONOR'S
21 CORRECT, IT'S -- IT IS THE LAW TO TAKE THE HOLISTIC VIEW OF
22 THE COMPLAINT, SO THAT'S -- THAT'S WHAT WE'LL DO.

23 FIRST, TO BE CLEAR, THE COMPLAINTS ARE NOT ALLEGING AND
24 WE'RE NOT ARGUING THAT JUST BECAUSE MAXELL CORPORATION OF
25 AMERICA IS A WHOLLY OWNED SUBSIDIARY OF HITACHI MAXELL LIMITED

1 OF JAPAN WHO HAS NOT CONTESTED THE CONSPIRACY ON PLAUSIBILITY
2 GROUNDS, WE'RE NOT SAYING JUST BECAUSE THEY'RE SUB, THEY'RE
3 IN.

4 SO LET'S LOOK AT WHAT WE ARE ALLEGING.

5 THE EMAIL MR. SEEBALD REFERENCES IS FOUND AT PARAGRAPHS --
6 PARAGRAPH 238 OF THE DIRECT PURCHASER COMPLAINT, THE --
7 SUBSTANTIALLY THE SAME PARAGRAPHS 237, 232, THE INDIRECT
8 COMPLAINT. IT SHOWS KNOWLEDGE. WHAT DO WE HAVE HERE?

9 WE HAVE IN JANUARY 2010, THE JAPANESE PARENT COMPANY,
10 HITACHI MAXELL LIMITED, TELLS FOLKS AT MAXELL CORPORATION OF
11 AMERICA, THAT HITACHI MAXELL, THE JAPANESE PARENT, IS
12 EXCHANGING INFORMATION WITH LG.

13 AND FOR US, THIS AMOUNTS TO A FACT ALLEGATION THAT MAKES
14 IT PLAUSIBLE THAT MAXELL CORPORATION OF AMERICA HAS KNOWLEDGE
15 OF A CONSPIRACY INVOLVING AT LEAST HITACHI AND LG. AND THIS
16 IS WHERE THE CONTEXT COMES IN. AND I WON'T REPEAT EVERYTHING
17 WE HAVE SAID, BUT THESE TYPES OF INFORMATION EXCHANGES BY
18 THEMSELVES -- THEY'RE NOT TO BE LOOKED AT BY THEMSELVES IN
19 ISOLATION.

20 AS YOUR HONOR'S ALREADY FOUND IN THE COURT'S PRIOR ORDER
21 ON MOTIONS TO DISMISS, IN WHAT WE'VE ALLEGED AS THIS
22 CONSPIRACY, PRICE-FIXING, BID-RIGGING, SUPPLY RESTRICTIONS,
23 CARRIED OUT THROUGH BILATERAL MEETINGS FOR THE MOST PART,
24 BILATERAL COMMUNICATIONS AND INFORMATION EXCHANGES ABOUT
25 PRICE, SUPPLY, YOU KNOW, BID STRATEGIES, AND SO FORTH, THAT

1 VIEWED IN -- IN -- HOLISTICALLY, THAT THIS JANUARY 2010 EMAIL,
2 WE CAN SAY MAXELL CORPORATION OF AMERICA KNOWS SOMETHING IS
3 AFOOT, AT LEAST BETWEEN ITS PARENT JAPANESE -- THE JAPANESE
4 PARENT HITACHI MAXELL AND LG.

5 OKAY. SO SOMETHING -- SOME CONSCIOUSNESS THERE. NOW,
6 WHAT DO THEY DO? WELL, THEY DO SOMETHING.

7 MAXELL CORPORATION OF AMERICA, WE ALLEGE -- THIS IS THE
8 OTHER -- THE OTHER ALLEGATION THAT MY COLLEAGUE REFERENCED.
9 AT THE DIRECT PURCHASER COMPLAINT, IT'S 237. INDIRECTS, IT'S
10 PARAGRAPH 232. WHAT DO THEY DO?

11 SOME SANYO EXECUTIVES, A FELLOW NAMED IGUCHI, HE GIVES
12 PRICE INFORMATION TO AN EXECUTIVE AT A DIFFERENT SANYO ENTITY
13 NAMED MATSUMUTO (PHONETIC) -- THAT'S THE GUY'S NAME, NOT
14 THE -- THE COMPANY'S NAME -- IN WHICH IGUCHI SAYS HE GOT THIS
15 INFORMATION FROM MAXELL, JUST MAXELL, NOT HITACHI MAXELL
16 LIMITED, NOT HITACHI, IT'S MAXELL.

17 SO, YOU KNOW, WE'RE NOT PLAYING GAMES. THE SUGGESTION IS
18 THAT WE'RE PLAYING GAMES WITH AN ARTIFICE OF HOW WE DEFINE
19 CORPORATIONS. THIS COMES FROM ANOTHER CORPORATION'S DOCUMENT.
20 THEY SAY IT'S MAXELL. THE INFERENCE -- THE REASONABLE
21 INFERENCE THE PLAINTIFFS ASK THE COURT TO DRAW AND TO AGREE
22 WITH US IS THAT THIS IS A REFERENCE TO MAXELL CORPORATION OF
23 AMERICA.

24 AND SO WHAT YOU HAVE IS THE CONSCIOUSNESS, THE KNOWLEDGE,
25 AND DOING SOMETHING. IT'S FAIR TO INFER THAT THE -- THE

1 COMMUNICATIONS AMONG THE SANYO EXECUTIVES IS THAT THEY GOT
2 COMPETITIVE INFORMATION FROM MAXELL. AND I'M NOT GOING TO
3 STAND HERE AND SAY THAT THAT'S A HUNDRED PERCENT A LOCK THAT
4 THAT'S MAXELL CORPORATION OF AMERICA. WE DIDN'T DEFINE IT AS
5 MAXELL. THAT COMES FROM THE DOCUMENT, FROM THE COMPETITORS'
6 FILES. AND SO THE INFERENCE WE ASK THE COURT AGREE WITH US
7 THAT IT'S REASONABLE TO DRAW -- IT'S A PLAUSIBLE INFERENCE;
8 DOESN'T HAVE TO BE THE ONLY ONE -- IS THAT IT'S MAXELL
9 CORPORATION OF AMERICA. AND -- NOT THAT YOU WANT A FEEDBACK
10 LOOP, BUT IT MAKES SOME SENSE THAT MAXELL CORPORATION OF
11 AMERICA IS AT LEAST PRIVY TO CONSPIRATORIAL COMMUNICATIONS AND
12 THAT GOES BACK TO THE -- THE FIRST EMAIL WE DISCUSSED, WHICH
13 IS THAT THEY KNOW AT LEAST HITACHI MAXELL LIMITED IN JAPAN,
14 ITS PARENT, AND LG ARE UP TO SOMETHING.

15 AND NOTHING FURTHER ON THAT, YOUR HONOR.

16 **MR. SEEBALD:** JUST -- JUST ON THAT, YOUR HONOR, IF I
17 HAVE A -- ONE MORE SECOND, YOU KNOW, WE'RE TALKING ABOUT AN
18 EMAIL -- ONE EMAIL IN THE CONTEXT OF A DEFENDANT THAT PRODUCED
19 ITS ENTIRE GRAND JURY PRODUCTION. AND ALL THEY CAN DO IS
20 POINT TO A 2010 EMAIL THAT SOMEONE RECEIVED AT MAXELL
21 CORPORATION OF AMERICA RELATING TO SOME COMMUNICATION WITH LG.
22 IT'S NOT EVEN CLEAR THAT THE COMMUNICATION WITH LG WAS AS A
23 COMPETITOR. THEY'RE A CUSTOMER OF OURS. YOU JUST CAN'T TELL.

24 SO THAT ONE ALLEGATION JUST CANNOT BE ENOUGH TO TIE MAXELL
25 CORPORATION OF AMERICA TO THIS DECADE-PLUS-LONG CONSPIRACY.

1 THAT JUST DIDN'T GET THEM OVER THE HUMP.

2 **THE COURT:** WELL, IS THERE ANY REQUIREMENT IN THE LAW
3 THAT THE INFERENCE OR REFERENCE TO A PARTICIPATION IN THE
4 CONSPIRACY BE FOR THE ENTIRE PERIOD?

5 **MR. SEEBALD:** I DON'T THINK THERE IS, BUT ALL WE'RE
6 TALKING ABOUT IS REALLY ONE EMAIL AND SOMEONE GETTING COPIED
7 AND YOU'RE -- YOUR DECISION TALKED ABOUT A CONSCIOUS DECISION
8 TO ENTER. I GET 300 EMAILS A DAY. I MEAN, JUST THE FACT THAT
9 YOU'RE LITERALLY COPIED ON AN EMAIL -- ONE PERSON OF THE
10 COMPANY COPIED ON A EMAIL ABOUT A CONVERSATION WITH LG --
11 AGAIN, WE DON'T KNOW WHETHER IT'S AS A COMPETITOR OR AS A
12 CUSTOMER -- THAT THAT JUST CANNOT BE ENOUGH TO CONSTITUTE A
13 CONSCIOUS DECISION TO ENTER INTO THIS ALLEGED CONSPIRACY.

14 **MR. SEEVER:** AND IF I MAY, YOUR HONOR, ON THE POINT
15 ABOUT THE TIMING, WE HAVE REALLY A PLAUSIBLE CONSPIRACY
16 ALLEGED FROM 2000 TO 2011. IT DOESN'T MATTER IF -- IF A
17 COMPANY ENTERS IT AT THE TAIL END, COULD BE THE LAST WEEK,
18 COULD BE THE LAST THREE YEARS, DOESN'T MATTER. THAT'S THE
19 OPERATION OF CONSPIRACY LAW, THAT THEY'RE ON THE HOOK FOR THE
20 WHOLE THING.

21 **THE COURT:** THAT WAS A RHETORICAL QUESTION,
22 MR. SEEVER.

23 **MR. SEEVER:** I DON'T THINK --

24 (LAUGHTER.)

25 **MR. SEEVER:** THANK YOU, YOUR HONOR.

1 **THE COURT:** OKAY.

2 **MR. SEEBALD:** WE JUST -- THERE WAS ONE OTHER ISSUE
3 THAT WE RAISED IN OUR INDIVIDUAL BRIEF THAT I'LL JUST MENTION,
4 AND IT DOVETAILS TO WHAT MR. KESSLER SAID. YOU KNOW, IN THE
5 COMPLAINT, IT'S ALLEGED AND ONLY ALLEGED THAT MAXELL --
6 HITACHI MAXELL, THE PARENT CORPORATION, USES THIRD-PARTY
7 PACKERS. THE -- THE COMPLAINT TALKS ABOUT EMPLOYING
8 THIRD-PARTY PACKERS.

9 THERE'S NO ALLEGATIONS THAT WE ACTUALLY HAD A SUBSIDIARY
10 THAT WAS PACKING THE BATTERIES, BUT THEY SAY "THIRD-PARTY
11 PACKERS," AND THAT'S ALL THEY SAY.

12 AND OUR POINT IS THIS: IS THAT, YOU KNOW, WE FULLY
13 SUPPORT MR. KESSLER'S ARGUMENTS, BUT WE WOULD SAY AT A
14 MINIMUM, THE MAXELL SALES SHOULD NOT BE PART OF THIS CASE
15 BECAUSE YOU HAVE A VERY CLEAR BREAK IN THE CHAIN. THEIR
16 COMPLAINT SAYS THAT WE USE -- EMPLOYED THIRD-PARTY PACKERS.
17 WE DIDN'T DO IT OURSELVES. WE HAD THIRD-PARTY PACKERS THAT,
18 QUITE FRANKLY, ARE FOREIGN THIRD-PARTY PACKERS.

19 AND SO WE'RE JUST -- THE POINT IN THE LAST PART OF THE
20 COMPLAINT IS NOT AN ISSUE OF JOINT-AND-SEVERAL LIABILITY FOR
21 THE -- THE SALES THAT MAY REMAIN IN THIS CASE. BUT THE POINT
22 IS, THERE WAS A BREAK IN OUR SALES ACCORDING TO THEIR
23 COMPLAINT. AND, THEREFORE, THOSE SALES REALLY SHOULD NOT BE
24 PART OF THIS CASE IF IT GOES FORWARD.

25 **THE COURT:** YOU WANT TO ADDRESS THAT POINT?

1 **MR. SEAVER:** WE DIVIDED THIS ISSUE AMONGST US, SO IF
2 THE COURT WILL PERMIT MR. SIMON TO ADDRESS YOUR HONOR.

3 **MR. SIMON:** I'LL BE VERY SHORT, YOUR HONOR.

4 THEIR ARGUMENT, WHICH IS IDENTICAL TO WHAT TOSHIBA IS
5 MAKING ON STANDING, JUST IS THE OPPOSITE OF WHAT ROYAL
6 PRINTING SAYS. ROYAL PRINTING, THE PLAINTIFF PURCHASER BOUGHT
7 FROM A WHOLESALER THAT WAS WHOLLY OWNED BY ONE OF THE
8 MANUFACTURERS AND DIDN'T EVEN BUY THAT MANUFACTURER'S PAPER.
9 SO -- AND ROYAL PRINTING SAYS BOTH UNDER JOINT AND SEVERAL AND
10 UNDER THE PERCEPTION TO ROYAL PRINTING THAT YOU CAN SUE ALL,
11 EVEN IF YOU DIDN'T BUY FROM ONE.

12 SO THEY'RE WRONG ON THE POINT. AND I, FRANKLY, DON'T EVEN
13 UNDERSTAND THEIR ARGUMENT BECAUSE IT'S AT ODDS WITH ROYAL
14 PRINTING.

15 **THE COURT:** RESPONSE?

16 **MR. SEEBALD:** WE THINK IT'S COMPLETELY IN LINE WITH
17 ROYAL PRINTING. THE POINT IS WHEN YOU HAVE A BROKEN CHAIN,
18 THOSE SALES CAN'T BE PART OF THE CASE. THERE MAY BE SALES
19 THAT ARE PART OF THE CASE. WE'LL SEE IF THAT IS OR NOT. AND
20 WE MAY BE JOINTLY AND SEVERALLY LIABLE THEORETICALLY, BUT MY
21 WHOLE POINT IS THE SALES THAT -- WHERE THERE IS A CLEAR BREAK
22 IN THE CHAIN, THEY JUST CAN'T BE PART OF THIS CASE.

23 **MR. FRIEDMAN:** YOUR HONOR, JEFF FRIEDMAN FOR INDIRECT
24 PURCHASER PLAINTIFF. I JUST WANT TO MAKE SURE THAT THE LAST
25 ARGUMENT THAT'S BEING RAISED ON THIS IS DIRECTED TOWARDS THE

1 DIRECT PURCHASER COMPLAINT, NOT AGAINST THE INDIRECT PURCHASER
2 COMPLAINT.

3 MR. SEEBALD: CORRECT.

4 MR. FRIEDMAN: THANK YOU, YOUR HONOR.

5 MR. SIMON: AND THE ONLY REFERENCE I WOULD GIVE YOU,
6 YOUR HONOR, IS THIS: IF YOU LOOK AT NIPPON PAPER, SEVENTH
7 CIRCUIT OPINION, WRITTEN BY JUDGE EASTERBROOK ON THIS POINT,
8 WHICH IS AS CITED IN SOME OF THE CASES IN THIS DISTRICT, 281
9 F.3D. 629, 2002, THERE'S LANGUAGE ON JOINT AND SEVERAL WHICH
10 JUST BLOWS HIS ARGUMENT OUT OF THE WATER.

11 THE COURT: DO YOU WANT TO ADDRESS THAT CASE?

12 MR. SEEBALD: WELL, AGAIN, I JUST WOULD POINT BACK TO
13 ROYAL PRINTING. WE DO THINK THAT WE ARE ON FIRM GROUNDS WITH
14 ROYAL PRINTING.

15 THE COURT: SO THE ANSWER IS NO?

16 MR. SEEBALD: YES, THAT'S CORRECT.

17 THE COURT: OKAY. ANYTHING ELSE ON THIS?

18 MR. SEEBALD: NOTHING, YOUR HONOR.

19 MR. SEEVER: NONE FROM PLAINTIFFS, YOUR HONOR.

20 THE COURT: OKAY.

21 LG CHEM?

22 MR. FRIEDMAN: GOOD MORNING AGAIN, YOUR HONOR. JEFF
23 FRIEDMAN FOR THE INDIRECT PURCHASER PLAINTIFFS, ALSO ARGUING
24 ON BEHALF OF THE DIRECT PURCHASERS.

25 MR. EWING: MORNING, YOUR HONOR. KENNETH EWING OF

1 STEPTOE & JOHNSON FOR LG CHEM AND LG CHEM AMERICA, INC.

2 YOUR HONOR, I THINK OUR -- OUR POINT'S FAIRLY
3 STRAIGHTFORWARD. OUR ARGUMENT IS ESSENTIALLY THAT, AGAIN, THE
4 U.S. SUBSIDIARY HERE HAS NOT BEEN ADEQUATELY TIED TO --

5 **THE COURT:** YOU'RE GOING TO NEED TO SPEAK UP,
6 MR. EWING.

7 **MR. EWING:** I APOLOGIZE.

8 YOUR HONOR, THE -- THE ARGUMENT HERE IS THAT THE U.S.
9 SUBSIDIARY LG CHEM AMERICA, INC. HAS NOT BEEN ADEQUATELY TIED
10 TO THIS CONSPIRACY. THE DIFFERENCE -- THE CHANGE FROM THE
11 FIRST COMPLAINT WHICH YOUR HONOR DISMISSED AS TO LG CHEM
12 AMERICA, INC. AND THE ONE WE HAD -- THE ONES WE HAVE NOW FOR
13 THE DPP'S AND THE IPP'S, IS AN ADDITION OF -- OF SEVERAL
14 ALLEGATIONS WHICH REALLY AMOUNT TO THE FOLLOWING:

15 FIRST, THERE ARE NO ALLEGATIONS AS TO CONDUCT BY LG CHEM
16 AMERICA BEFORE 2005. FOR THE PERIOD 2005 AND -- TO 2009,
17 THERE ARE ALLEGATIONS THAT ESSENTIALLY ARE RECEIPT OF
18 INFORMATION FROM THE PARENT IN KOREA ABOUT ACTIVITIES GOING ON
19 ELSEWHERE.

20 BUT WE SUBMIT, YOUR HONOR, IF ONE LOOKS AT THE SPECIFIC
21 ALLEGATIONS IN THE COMPLAINT, THE -- THERE ARE NO ALLEGATIONS
22 OF CONDUCT BY LG CHEM AMERICA, INC. THAT ACTUALLY FURTHER THIS
23 CONSPIRACY THAT HAS BEEN ALLEGED IN THE OTHER PARAGRAPHS.

24 TO -- WHAT WE DO SEE ARE REFERENCES TO EMAIL
25 COMMUNICATIONS, SOME OF THEM TO -- COMMUNICATIONS THAT WERE

1 MERELY RECEIVED AS -- AS COPIES INDICATED IN THE COMPLAINTS --
2 IN THE ALLEGATIONS THEMSELVES.

3 OTHERS WERE ALLEGEDLY COMMUNICATIONS DIRECTED TO SEVERAL
4 ENTITIES, FOREIGN SALES ENTITIES. BUT EVEN THOSE REFERENCES,
5 YOUR HONOR, DO NOT DO ANYTHING MORE THAN COMMUNICATE
6 INFORMATION ABOUT WHAT WAS GOING ON ELSEWHERE. THERE ARE NO
7 ACTUAL ALLEGATIONS THAT LG CHEM AMERICA, INC. DID ANYTHING TO
8 FURTHER THE CONSPIRACY HERE.

9 AND WE SUBMIT, YOUR HONOR, THAT, THEREFORE, THOSE
10 ALLEGATIONS ARE NOT SUFFICIENT TO REACH THE STANDARD THAT YOUR
11 HONOR RECOGNIZED IN YOUR ORIGINAL ORDER HERE DISMISSING LG
12 CHEM AMERICA, INC. THAT THERE BE A CONSCIOUS DECISION TO
13 PARTICIPATE.

14 KNOWLEDGE OF WHAT'S GOING ON IS NOT THE SAME AS CONSCIOUS
15 DECISION TO PARTICIPATE. FUNDAMENTALLY, THAT'S OUR -- OUR
16 POSITION HERE, THAT THERE HASN'T BEEN AN ADDITION TO THESE
17 COMPLAINTS THAT IS SUFFICIENT TO -- TO REACH THAT STANDARD.
18 AND -- AND FOR THAT BASIS, WE'RE ASKING THAT THE COMPLAINTS BE
19 NARROWED DOWN.

20 NOW, I WILL POINT OUT TO YOU, I AM NOT SAYING THE SAME
21 THING WITH RESPECT TO ALLEGATIONS RELATING TO AN EVENT IN
22 2010.

23 AND TO JUMP TO ONE OF THE ARGUMENTS THAT PLAINTIFFS HAVE
24 MADE AND INDICATED EARLIER AS WELL, WE'RE NOT TAKING THE
25 POSITION, YOUR HONOR, THAT A -- A LATE JOINER TO A CONSPIRACY

1 IS NOT POTENTIALLY LIABLE FOR CONDUCT THAT IT KNEW ABOUT WHEN
2 IT JOINED, THAT PREDATED THE JOINING.

3 WHAT WE'RE ARGUING IS THAT WHATEVER HAPPENED IN 2010, WHAT
4 HAS BEEN ALLEGED TO OCCUR IS NOT AT ALL LIKE THE CONDUCT THAT
5 HAS BEEN ALLEGED ELSEWHERE IN THIS CONSPIRACY. IT IS A
6 BILATERAL EXCHANGE OF INFORMATION AND -- AND AGREEMENT OR
7 DISCUSSION OF -- OF TRYING TO --

8 **THE COURT:** YOU KNOW, I DON'T UNDERSTAND WHY I WOULD
9 AT THIS JUNCTURE, IF IT -- IF THERE IS SUFFICIENT ALLEGATIONS
10 AT ONE PERIOD IN TIME IN THE CONSPIRACY, WHY I WOULD MAKE THE
11 KINDS OF, QUOTE, UNQUOTE, PRUNING RECOMMENDATIONS THAT YOU ARE
12 REQUESTING.

13 CONSPIRACIES BY THEIR NATURE ARE SECRETIVE. THAT'S THE
14 NATURE OF -- IT'S FUNDAMENTAL. IF -- IF THEY WANTED EVERYBODY
15 TO KNOW, THESE WOULD BE EASY CASES. WHEN THERE IS SUFFICIENT
16 ALLEGATION THAT THERE IS PARTICIPATION AT SOME POINT IN TIME
17 IN THE CONSPIRACY, WHAT YOU'RE ASKING ME TO DO REALLY SUGGESTS
18 THAT YOU WANT ME TO MAKE SOME FACTUAL DETERMINATIONS ON AN
19 INCOMPLETE RECORD OR AT LEAST GIVE YOU COVER -- YOUR CLIENT
20 COVER BECAUSE THEY'VE NOT YET UNEARTHED THE -- WHETHER THERE
21 WAS ANY PARTICIPATION PRIOR TO THAT TIME.

22 AND I DON'T THINK THAT IT IS PRUDENT. I DON'T THINK THAT
23 IT IS PROCEDURALLY PROPER.

24 **MR. EWING:** YOUR HONOR, IN GENERAL, I WOULD AGREE
25 WITH YOU. IF THIS COMPLAINT HAD SUFFICIENTLY ALLEGED

1 PARTICIPATION, I WOULD AGREE WITH YOU.

2 OUR CONTENTION, YOUR HONOR, IS THAT WHATEVER THEY HAVE
3 ALLEGED WITH RESPECT -- WHAT THEY HAVE ALLEGED WITH RESPECT TO
4 2010 IS NOT SUFFICIENT TO LINK LG CHEM AMERICA, INC. TO THE
5 VERY BROAD CONSPIRACY THAT HAS BEEN ALLEGED HERE. AND I'M NOT
6 TALKING ABOUT TIME PERIODS PER SE, TALKING ABOUT THE NATURE OF
7 THE ACTUAL ALLEGATIONS COMPARED TO THE REST OF THE ALLEGATIONS
8 IN THIS COMPLAINT AND THIS -- THE KINDS OF ACTIVITIES THAT
9 WERE GOING ON.

10 THESE ARE FUNDAMENTALLY DIFFERENT KINDS OF -- OF
11 COMMUNICATIONS, FUNDAMENTALLY DIFFERENT KINDS OF OBJECTIVES.

12 THE ALLEGATIONS WITH RESPECT TO 2010 RELATE TO A SINGLE
13 ENTITY, APPLE. THEY RELATE TO A SINGLE EVENT, SINGLE END
14 PRODUCT, AND MOREOVER, CLEARLY ARE -- ARE ONLY AS BETWEEN TWO
15 PARTICULAR COMPANIES. THEY DO NOT INVOLVE ANY OF THE OTHER
16 ENTITIES INVOLVED IN THIS CASE.

17 THE PLAINTIFFS HAVE MADE REPEATED REFERENCES TO THE FACT
18 THAT LG CHEM, THE PARENT COMPANY, HAS PLED GUILTY. THE PARENT
19 COMPANY HAS PLED GUILTY, AS YOUR HONOR VERY WELL KNOWS, AS DO
20 I.

21 THERE'S A REASON THAT THAT PLEADING DID NOT INCLUDE 2010.
22 THERE'S ALSO A REASON WHY THAT PLEAD -- PLEADING GUILTY DIDN'T
23 INCLUDE LG CHEM AMERICA, INC. THE PLAINTIFFS ALREADY HAVE
24 THIS POINT -- AT THIS PROCEDURAL JUNCTURE ALL OF THE DOCUMENTS
25 THAT LG CHEM AND LG CHEM AMERICA PROVIDED TO THE DEPARTMENT OF

1 JUSTICE.

2 IF THERE WERE A BASIS TO TIE LG CHEM AMERICA, INC. TO THIS
3 BROAD CONSPIRACY, THEY WOULD HAVE IT. THEY COULD HAVE PLED
4 IT, BUT THEY DIDN'T. THAT'S OUR POINT OF VIEW.

5 **THE COURT:** YOU KNOW, THAT -- THIS ISSUE OF DISCOVERY
6 HAS COME UP A NUMBER OF TIMES AND WHAT'S BEEN PRODUCED AND
7 HASN'T BEEN PRODUCED. I DON'T THINK I'VE EVER RECEIVED A COPY
8 OF THE SUBPOENA TO WHICH ALL OF THESE DEFENDANTS REPLIED. SO
9 I DON'T KNOW WHAT IT IS THAT THEY ACTUALLY PRODUCED, AND IF
10 THEY'VE PRODUCED EVERYTHING, WHY IS IT THAT MAGISTRATE RYU HAS
11 HAD DISCOVERY DISPUTES ALREADY IN TERMS OF PRODUCTION OF MORE
12 DOCUMENTS. ARE THERE --

13 **MR. FRIEDMAN:** SO --

14 **THE COURT:** SO ARE THERE MORE DOCUMENTS OR NOT? HAVE
15 THE DEFENDANTS PRODUCED THE ENTIRETY OR NOT?

16 **MR. FRIEDMAN:** SO -- GREAT QUESTION. AND -- YOU MAY
17 HEAR MORE THAN YOU WANT TO, SO CUT ME OFF.

18 **THE COURT:** I WILL. DON'T WORRY.

19 **MR. FRIEDMAN:** I KNOW YOU WILL.

20 SO LET ME MAKE A COUPLE OF COMMENTS ON THAT.

21 THEY WON'T TELL US SPECIFICALLY THE SCOPE OF THE
22 PRODUCTION, THE AGREEMENTS. FREQUENTLY, AS THE COURT MAY VERY
23 WELL KNOW, DEPARTMENT OF JUSTICE AND DEFENDANTS WILL ENTER
24 NEGOTIATIONS AS TO THE SCOPE OF PRODUCTION. DEPARTMENT OF
25 JUSTICE DOES NOT HAVE LEGAL AUTHORITY TO SUBPOENA DOCUMENTS

1 ABROAD, SO FREQUENTLY WHAT ENDS UP HAPPENING IS, IS THAT THERE
2 IS A NEGOTIATED CORPUS OF INFORMATION THAT IS OBTAINED.

3 WE, MUCH TO THEIR CHAGRIN AND, I'M SURE, YOURS AND
4 MAGISTRATE RYU'S, BELIEVE TYPICALLY THAT THAT CORPUS IS A
5 SUBSET THAT NEEDS TO BE BROADENED.

6 ONE OF THE WAYS THAT CORPUS IS SHRUNK IS THE WAY IN WHICH
7 SEARCH TERMS ARE APPLIED. FREQUENTLY IN CASES THAT WE'VE
8 HAD -- OPTICAL DISK DRIVE BEING MOST RECENT -- WE GO IN AND
9 SAY, WE WANT TO SEE THE SEARCH TERMS YOU USED. THEY'RE
10 USUALLY RESISTANT, BUT THE TIMES WE GET THEM, WE FIND THEY ARE
11 FAR DIFFERENT -- AND THERE'S -- FAR DIFFERENT PROCESS THAT
12 GOES ON IN TERMS OF BACK AND FORTH ON WHAT THE SEARCH TERMS
13 ARE.

14 AND WE, FOR EXAMPLE IN THE OPTICAL DISK DRIVES ULTIMATELY
15 WERE ABLE TO GET BROADER SEARCH TERMS, AND LO AND BEHOLD, WE
16 GOT MORE INCRIMINATING DOCUMENTS.

17 SO THAT'S WHAT HAPPENS, YOUR HONOR, SO THE ANSWER IS, ARE
18 ALL OF THEM PRODUCED, OF COURSE NOT. NOW --

19 **THE COURT:** SO LET ME JUST -- LET ME JUST --

20 **MR. FRIEDMAN:** SURE.

21 **THE COURT:** -- ASK --

22 **MR. EWING:** LET ME PUT MY NAME IN YOUR MOUTH,
23 MR. EWING.

24 **THE COURT:** MR. EWING, YEAH, SORRY. EWING.

25 HAS MR. FRIEDMAN DESCRIBED GENERALLY THE PROCESS

1 WITHOUT -- YOU DON'T HAVE TO TELL ME WHETHER OR NOT THAT
2 HAPPENED IN THIS PARTICULAR CASE, BUT GENERALLY, IS THAT
3 ACCURATE FROM YOUR PERSPECTIVE?

4 OR IS IT YOUR POSITION, I GUESS, THAT YOU'VE PRODUCED
5 EVERYTHING THAT THERE IS TO BE PRODUCED.

6 **MR. EWING:** YOUR HONOR, AS YOU WELL KNOW, WE'RE IN
7 THE PROCESS RIGHT NOW OF WORKING THROUGH THE DISCOVERY PROCESS
8 HERE. ALTHOUGH MR. FRIEDMAN HAS MADE REFERENCES TO OTHER
9 CASES WHICH DID NOT INCLUDE MYSELF OR LG CHEM, ABOUT
10 RESISTANCE AND -- AND DIFFICULTIES. IT SEEMS TO ME WE'RE
11 WORKING VERY AMICABLY TOGETHER TO WORK THROUGH THAT PROCESS,
12 INCLUDING ESI AND THE DEPOSITION --

13 **MR. FRIEDMAN:** I WASN'T CRITICIZING.

14 **MR. EWING:** AND I JUST WANT TO BE CLEAR, THAT --

15 **THE COURT:** AND I DID NOT --

16 (SIMULTANEOUS COLLOQUY.)

17 **MR. EWING:** THIS IS A PROCESS --

18 **THE COURT:** I DID NOT MEAN TO SUGGEST THAT MAGISTRATE
19 JUDGE RYU WAS COMPLAINING THAT THERE WAS UNPROFESSIONAL
20 CONDUCT HAPPENING. THAT'S -- THAT WASN'T MY SUGGESTION.
21 MY -- I WAS REALLY TRYING TO UNDERSTAND THE SCOPE OF THE CLAIM
22 THAT IT'S ALL THERE, WHICH IS ESSENTIALLY AN ARGUMENT THAT
23 I'VE HEARD FROM THE DEFENDANTS, THAT IF THEY -- YOU KNOW, THEY
24 HAVE SO MUCH, IF IT WAS THERE, WE'D KNOW IT BY NOW OR THE
25 COMPLAINT COULD BE MORE DEVELOPED. BUT I DON'T KNOW THAT.

1 **MR. EWING:** YOUR HONOR, I THINK THE CLAIM THAT I HAVE
2 BEEN MAKING AND I THINK THE OTHERS ON THE DEFENSE SIDE HAVE
3 BEEN MAKING, IT'S NOT THAT ABSOLUTELY EVERYTHING UNDER THE SUN
4 THAT COULD CONCEIVABLY BE CALLED FOR IN DISCOVERY BY
5 PLAINTIFFS IN THIS CASE HAS ALREADY BEEN TURNED OVER TO THE
6 DOJ AND THEN TO THEM. IT WILL ALWAYS BE POSSIBLE TO ASK FOR
7 MORE.

8 **THE COURT:** WELL, HAVE YOU THEN --

9 **MR. EWING:** SO I --

10 **THE COURT:** HAVE YOU SHARED WITH THE PLAINTIFFS
11 THE -- THE EXTENT OF THE PRODUCTION THAT HAS BEEN MADE?

12 **MR. EWING:** YOUR HONOR, WE HAVE A SCHEDULE IN WHICH
13 WE WILL DO EXACTLY THAT, I THINK, BY THE 15TH OF AUGUST, IF I
14 REMEMBER THE DATES CORRECTLY. WE WILL BE CHARACTERIZING WHAT
15 HAS BEEN TURNED OVER TO THE DOJ. THAT WAS WORKED OUT WITH
16 MAGISTRATE RYU'S ASSISTANCE. SO WE'RE IN PROCESS OF DOING
17 THIS. IT'S NOT A SITUATION OF HOLDING ANYTHING BACK. WE'RE
18 JUST WORKING THROUGH THE PROCESS.

19 MY POINT, YOUR HONOR, EARLIER ABOUT TURNING EVERYTHING
20 OVER THAT HAD BEEN TURNED OVER TO THE DOJ IS THAT WE HAVE
21 TURNED OVER EVERYTHING -- WE, OTHERS IN THE DEFENSE GROUP --
22 HAVE TURNED OVER AN ENORMOUS AMOUNT OF INFORMATION, LARGE
23 NUMBERS OF DOCUMENTS THAT WERE TURNED OVER TO DOJ AND MADE
24 AVAILABLE AT THIS VERY EARLY STAGE IN THE PROCESS.

25 THIS IS UNUSUAL.

1 **THE COURT:** WELL, NOT ACCORDING TO ALL THE DISTRICT
2 JUDGES I SPOKE TO AT THE LAST MDL CONFERENCE, BUT GO AHEAD.

3 **MR. EWING:** WELL, YOUR HONOR, I -- I RESPECTFULLY
4 SUGGEST THAT THERE ARE PLENTY OF CASES IN WHICH THIS HAS NOT
5 HAPPENED. THE USUALNESS AND UNUSUALNESS PERHAPS I SHOULDN'T
6 HAVE MENTIONED THAT. THE KEY POINT IS THAT THEY ACTUALLY HAVE
7 THIS INFORMATION AND HAVE HAD IT WHEN THEY CONSTRUCTED THEIR
8 FIRST COMPLAINT AND THIS SECOND SET OF COMPLAINTS.

9 ALL I'M TRYING TO SAY, YOUR HONOR, IS THAT WITH RESPECT TO
10 LG CHEM AMERICA, INC., THE ALLEGATIONS THAT THEY HAVE MADE ARE
11 BASED ON A FAIRLY EXTENSIVE SET OF DOCUMENTATION.

12 WE HEARD EARLIER FROM ONE OF MR. FRIEDMAN'S CO-COUNSEL
13 HERE THAT LG -- LG CHEM IS ALL OVER THE DOCUMENTS. WELL,
14 THAT'S BECAUSE THERE ARE A LOT OF DOCUMENTS FROM LG CHEM THAT
15 HAVE BEEN TURNED OVER. THAT'S A FAIRLY SOLID BASIS.

16 IS IT EVERYTHING? PROBABLY NOT. WE HAVEN'T YET RECEIVED
17 DISCOVERY REQUESTS FROM THEM, YOUR HONOR. AND IT'S ALWAYS
18 POSSIBLE TO ASK FOR MORE.

19 **MR. FRIEDMAN:** YOUR HONOR, JUST A FEW THINGS. FIRST
20 OF ALL, I WILL ALWAYS -- AS A PLEDGE TO YOU, I WILL TRY TO
21 DIRECTLY ANSWER YOUR QUESTIONS. I MAY NOT DO IT
22 SATISFACTORILY, BUT I WILL ALWAYS TRY AND BE DIRECT TO GIVE
23 YOU THE DIRECT ANSWER AND THEN EXPLAIN IF I DISAGREE WITH THE
24 COURT.

25 I BELIEVE YOU ASKED COUNSEL WHETHER OR NOT MY

1 REPRESENTATION OF THE PROCESS IN GENERAL IS ACCURATE, AND I
2 DIDN'T HEAR A "YES" OR A "NO," BUT SETTING THAT ASIDE, I CAN
3 REPRESENT DIRECTLY TO YOU THAT THAT IS A PROCESS THAT I'VE
4 DESCRIBED TO YOU THAT IS ONGOING. IT IS -- HAPPENS IN ALL
5 THESE CASES, AND NOTHING THAT I'VE DESCRIBED DO I HEAR A
6 DISAGREEMENT WITH. I'VE HEARD WE'RE WORKING THROUGH THE
7 PROCESS, WHICH THAT I AGREE WITH.

8 SECOND POINT, YOUR HONOR, IS I HOPE THAT WE DO NOT FIGHT
9 OVER SEARCH TERMS AND WE DON'T GET ARGUMENTS WHICH WE SEE IN
10 OTHER CASES THAT THEY'RE PRIVILEGED AND WE GET IN ALL THESE
11 ARGUMENTS. I HOPE WE DON'T. WE FREQUENTLY DO.

12 SETTING THAT ALL ASIDE, LG CHEMICAL AMERICA, I WAS
13 SURPRISED THAT THEY FILED A MOTION TO DISMISS. I REALLY WAS.
14 I SEE A LOT OF MOTIONS TO DISMISS IN A LOT OF SITUATIONS, BUT
15 IF YOU -- WE GAVE YOU THE CHART. I'M NOT GOING TO BELABOR IT,
16 BUT I WILL TELL YOU THIS IN THE BROADER CONTEXT: IF YOU LOOK
17 AT, FOR EXAMPLE, PARAGRAPHS (SIC) 180, JUST FOR EXAMPLE, WHERE
18 YOU HAVE AN OCTOBER 25TH, 2005 DETAILING OF MR. OH TELLING AN
19 LG CHEM AMERICA, INC. EMPLOYEE YOUNG SUNG KIM THAT IT WAS,
20 QUOTE, IMPORTANT TO COLLABORATE WITH DEFENDANT SDI IN
21 NEGOTIATING PRICES TO PACKER SIMPLO AND THAT THEY, QUOTE, HAVE
22 TO WATCH SDI OFFER PRICES IN NEGOTIATING WITH SIMPLO.

23 NOW, WE -- WE HAVE BASICALLY ALMOST, I THINK, A DOZEN
24 DETAILED ALLEGATIONS COVERING THE U.S. SUBSIDIARY. AND SO
25 THE -- THE ARGUMENT HERE TO ME IS A LITTLE FAR WHEN IT COMES

1 TO LG AMERICA.

2 AND THEN I WANT TO MAKE THIS LAST FINAL, BROADER POINT,
3 YOUR HONOR, SO -- AND YOU HEARD ME ABOUT -- AND I THINK THE
4 COURT UNDERSTANDS CONSPIRACY LAW PROBABLY BETTER THAN I DO,
5 BUT -- BUT I WILL SAY THIS SO I DON'T WANT TO SORT OF GILD THE
6 LILY ON IT, BUT YOU CAN LOOK AT CONDUCT AND INFERENCES THAT
7 REQUIRE -- THAT ARE REQUIRED OR IMPORTANT TO HAVE A CONSPIRACY
8 OPERATIONALIZED AND SUCCESSFUL.

9 SO I WOULD JUST ASK THE COURT IN ITS CONTEXTUALLY LOOKING
10 AT ALL OF WHAT'S BEING ARGUED TO YOU ABOUT THESE INDIVIDUAL
11 DEFENDANTS, THE IDEA THAT THEY'RE PUTTING FORTH IS THAT YOU
12 HAVE A PARENT THAT IS ENGAGING IN A HORIZONTAL CONSPIRACY OVER
13 PRICING AND THAT THEY ARE SUBSIDIARY, THAT IS, RESPONSIBLE IN
14 PART, YOUR HONOR, IN NEGOTIATING PRICES, ARE CABINED FROM THE
15 CONSPIRACY AND CABINED FROM BEING ABLE TO -- AND PRACTICALLY
16 SPEAKING, BUSINESS-WISE, YOUR HONOR.

17 SO NOW I'M AN LG CHEM AMERICA, INC. EMPLOYEE THAT'S
18 DEALING WITH THE U.S. OEM'S. AND I'M DEALING WITH SELLING,
19 AND I'M DEALING WITH PRICING ISSUES. AND I NEED TO THINK
20 ABOUT MY COMPETITOR SO -- BECAUSE I'M COMPETING IF I WASN'T
21 RESTRAINING THE MARKET. AND SO IF I'M COMPETING TO GET YOUR
22 BUSINESS AND I'M GOING TO GO AND SAY, I'M GOING TO LOWER
23 PRICES TO YOU, BECAUSE I'M AFRAID HE'S GOING LOWER PRICES TO
24 YOU, AND I'M THE U.S. REP HERE GETTING YOUR BUSINESS, AND WHAT
25 INSTEAD IS GOING ON IS HIS PARENT AND MY PARENT ARE SAYING,

1 LET'S RESTRAIN PRICES, AND I DON'T KNOW THAT, AND I'M NOT
2 OPERATIONALIZING THE RESTRAINT TO YOU.

3 THE CONSPIRACY DOESN'T WORK. IT'S NONSENSICAL. THEY KNOW
4 IT'S NONSENSICAL. YOU HAVE TO HAVE THE INTEROPERABILITY
5 BETWEEN CORPORATE ENTITIES IN ORDER TO SUCCEED IN THEIR GOAL
6 WHICH IS TO RESTRAIN COMPETITION, SO I JUST OFFER THAT
7 CONTEXTUALLY.

8 (SIMULTANEOUS COLLOQUY.)

9 **THE COURT:** LET ME ASK A QUESTION CONTEXTUALLY. THE
10 UNITED STATES ISN'T THE ONLY MARKET.

11 **MR. FRIEDMAN:** CORRECT.

12 **THE COURT:** SO ARE YOU SUGGESTING THAT PERHAPS,
13 THEORETICALLY, PERHAPS THE CONSPIRACY WORKS IN ALL MARKETS BUT
14 THE UNITED STATES MARKET BECAUSE THE UNITED STATES
15 CORPORATIONS KNOW BETTER?

16 **MR. FRIEDMAN:** YES. IT NEEDS TO.

17 **THE COURT:** WHY?

18 **MR. FRIEDMAN:** BECAUSE, YOUR HONOR, IT'S GLOBAL
19 PRICING THAT GOES ON.

20 SO I'M DELL, AND WE KNOW THIS NOW FROM THESE OTHER CASES.
21 WHAT HAPPENS IS DELL LOOKS TO SET PRICES. AND YOU'RE GOING TO
22 HEAR THESE ARGUMENTS DOWN THE ROAD. THERE'S ALL THESE
23 ARGUMENTS THAT YOU'RE GOING TO HEAR DOWN THE ROAD. I'M SORRY
24 THAT WE OPENED THIS --

25 **THE COURT:** NO.

1 **MR. FRIEDMAN:** I APOLOGIZE, BUT I'M GOING TO GIVE YOU
2 THE ANSWER, MAYBE MORE THAN YOU WANT, SO WHAT HAPPENS IS DELL
3 ONE OF THE LARGEST WORLDWIDE COMPUTER SALES, OKAY? DELL AND
4 HP IN THE UNITED STATES MAKE UP APPROXIMATELY, LET'S SAY, 50
5 PERCENT GIVE OR TAKE OVER THE YEARS IN THE U.S.

6 IN THE WORLD, THEY CAN MAKE UP ANYWHERE, DEPENDING UPON
7 THE YEAR, 20 TO 30 PERCENT OF THE MARKET. THESE TWO U.S.
8 COMPANIES -- AND THEN APPLE BECAME A GREATER AND GREATER
9 PERCENTAGE OF THE MARKET ESPECIALLY WHEN YOU'RE NOW TALKING
10 ABOUT FIXING THINGS THAT GO INTO IPHONES AND IPADS, WHICH MAKE
11 UP A LARGE SHARE OF THE GLOBAL MARKET.

12 SO YOU HAVE OEM'S IN THE UNITED STATES THAT MAKE UP A VERY
13 SIGNIFICANT SHARE OF WORLDWIDE SALES, CLEARLY OF U.S. SALES,
14 BUT ARE MATERIAL IN WORLDWIDE SALES. AND SO WHAT YOU HAVE IS
15 A LOT, YOUR HONOR, THAT GOES INTO ANALYZING, SAYING, WHEN YOU
16 SET PRICES FOR HP, DELL, APPLE, WHICH ARE U.S. COMPANIES,
17 YOU'RE DRIVING THE PRICES FOR THE WORLD.

18 AND SO IT BECOMES EXTREMELY IMPORTANT IN OPERATIONALIZING
19 THE CONSPIRACY THAT IS NOT GOING TO JUST IMPACT JUST U.S.
20 SALES BUT ARE GOING TO BE EFFECTIVE GLOBALLY BECAUSE DELL
21 ISN'T GOING TO BUY A BATTERY FOR SOMETHING -- THEY'RE BUYING
22 EN MASSE BATTERIES, AND THEN THEY ARE GOING TO DISTRIBUTE
23 THEIR PRODUCTS THROUGHOUT THE WORLD. AND SO THEY DON'T COME
24 UP WITH A DIFFERENT PRICE FOR EACH ONE OF THEM. THEY MAY HAVE
25 SHIPPING ISSUES OR THINGS LIKE THAT. BUT CORE PRICING,

1 THEY'RE NOT DOING -- CORE PRICING IS WORLDWIDE. THEY'RE
2 GLOBAL PRICES.

3 **MR. EWING:** YOUR HONOR, IF I MAY --

4 **THE COURT:** MR. EWING, I'M GOING TO ALLOW YOU JUST TO
5 RESPOND BRIEFLY AND THEN WE'LL TAKE A QUICK BREAK BECAUSE I'VE
6 NOT GIVEN MY COURT REPORTER A BREAK YET.

7 **MR. EWING:** YOUR HONOR, TWO POINTS. YOU'VE JUST
8 HEARD A LOT OF ASSUMPTIONS ABOUT HOW THE MARKETS WORK, ABOUT
9 ENTITIES, DELL, HP, ABOUT ODM'S, ALL OF WHICH ARE, OF COURSE,
10 NOT IN THE COMPLAINTS, OKAY?

11 **THE COURT:** NO, I UNDERSTAND.

12 **MR. EWING:** AND -- AND I THINK THAT'S VERY IMPORTANT
13 HERE, BECAUSE WE ALSO DON'T HAVE ALLEGATIONS ABOUT LG CHEM
14 AMERICA, INC.'S ACTUAL NEGOTIATIONS WITH ANY OF THESE
15 PURCHASERS. WE DON'T KNOW ANYTHING ABOUT THAT FROM THE
16 COMPLAINT.

17 INFERENCES ABOUT THE ROLE OF LG CHEM AMERICA IN
18 IMPLEMENTING ARE NOT BASED ON FACTS OR ALLEGATIONS IN THIS
19 COMPLAINT, RATHER. THEY'RE JUST SPECULATION BEING OFFERED BY
20 MR. FRIEDMAN HERE.

21 THE COMPLAINT IS THE TOUCHSTONE. YOU'LL BE LOOKING AT THE
22 THIS VERY CLOSELY. I UNDERSTAND THAT, YOUR HONOR, AND I
23 APPRECIATE THE TIME.

24 **THE COURT:** WE'LL JUST TAKE -- HOW MUCH DO YOU NEED?
25 FIVE? TEN MINUTES?

1 **THE REPORTER:** IS TEN OKAY?

2 **THE COURT:** TEN MINUTES.

3 (RECESS TAKEN AT 11:04 A.M.; PROCEEDINGS RESUMED AT 11:15
4 A.M.)

5 **THE COURT:** NEXT, NEC CORPORATION.

6 WE'RE BACK ON THE RECORD. THE RECORD WILL REFLECT THAT
7 ALL THE PARTIES ARE HERE AND/OR FILING INTO THE COURTROOM.

8 MOTION TO DISMISS, NEC CORP.

9 SIR, GOOD MORNING.

10 **MR. MEENAN:** GOOD MORNING, YOUR HONOR. SEAN MEENAN
11 OF WINSTON & STRAWN, COUNSEL FOR NEC CORPORATION AND NEC TOKIN
12 CORPORATION.

13 **MR. SEAVER:** GOOD MORNING, AGAIN. TODD SEAVER OF
14 BEHALF OF PLAINTIFFS.

15 **THE COURT:** OKAY. MR. MEAN -- MEENAN.

16 **MR. MEENAN:** YES.

17 IN THIS COURT'S PREVIOUS ORDER ON THE LAST ROUND OF
18 MOTIONS TO DISMISS, THE ORDER MADE CLEAR THAT PLAINTIFFS ARE
19 REQUIRED TO ALLEGE THAT EACH INDIVIDUAL DEFENDANT JOIN THE
20 CONSPIRACY AND PLAYED SOME ROLE IN IT.

21 NONETHELESS, BOTH DPP'S AND IPP'S DEFINED NEC CORPORATION
22 AND NEC TOKIN CORPORATION COLLECTIVELY AS, QUOTE, UNQUOTE,
23 NEC.

24 PLAINTIFFS NOW ASK THIS COURT TO INFER THAT ALLEGATIONS
25 AGAINST, QUOTE, UNQUOTE, NEC SHOULD BE INTERPRETED TO RELATE

1 TO NEC CORPORATION, BUT --

2 **THE COURT:** SO CAN -- I'M GOING TO STOP YOU.

3 **MR. MEENAN:** YES.

4 **THE COURT:** GENTLEMEN, THIS IS THE FOURTH OF THESE
5 INDIVIDUAL MOTIONS THAT I HAVE. GIVEN THE MILLIONS OF DOLLARS
6 THAT HAVE ALREADY BEEN SPENT ON THE CASE, I DECIDED TO ALLOW
7 YOU TO ARGUE. I DON'T WANT TO RE-HEAR THE SAME DARNED THING
8 TIME AND TIME AGAIN. I UNDERSTAND THE STANDARD. I UNDERSTAND
9 MY DUTY. TALK ABOUT YOUR CLIENT, AND THAT'S IT. THAT'S ALL
10 YOU'RE GETTING, BECAUSE, FRANKLY, IF IT WERE UP TO ME -- AND I
11 GUESS IT IS UP TO ME -- I WOULD SAY NO, YOU COULDN'T HAVE ANY
12 ARGUMENT WHATSOEVER. I'M DONE AT THIS POINT, SO I'M GOING TO
13 GIVE YOU A FEW MINUTES AND --

14 GO AHEAD. YOU CAN CONTINUE, BUT FOCUS ON YOUR CLIENT AND
15 THAT IS ALL.

16 **MR. MEENAN:** YES, YOUR HONOR.

17 LIKE TO TAKE A LOOK AT SOME OF THE ALLEGATIONS THAT
18 PLAINTIFFS PRESENTED IN THEIR DEMONSTRATIVE. FOR EXAMPLE, IPP
19 ALLEGATION PARAGRAPH 87, 92, 110, AS WELL AS DPP PARAGRAPH
20 111, EACH ALLEGE CONDUCT RELATING TO NEC TOKIN CORPORATION,
21 NOT NEC CORPORATION.

22 SIMILARLY, DPP PARAGRAPH 139 ALLEGES INFORMATION THAT
23 RELATES TO, QUOTE, UNQUOTE, NEC. BUT WHEN READ IN CONJUNCTION
24 WITH IPP PARAGRAPH 92, IT'S CLEAR THAT THAT ALLEGATION
25 RELATING TO, QUOTE, UNQUOTE, NEC, IN FACT, RELATES TO NEC

1 TOKIN CORPORATION.

2 SPECIFICALLY DPP PARAGRAPH 139 RELATES TO MEETINGS FROM --
3 ALLEGED MEETINGS FROM FEBRUARY 21ST TO FEBRUARY 25TH, 2005,
4 ALLEGEDLY INVOLVING NEC. IPP PARAGRAPH 92 ALLEGES MEETINGS
5 FROM FEBRUARY 21 TO 25, 2005, INVOLVING NEC TOKIN CORPORATION.

6 SIMILARLY, DPP PARAGRAPH 177 ALLEGES A MEETING ON DECEMBER
7 5TH, 2008 INVOLVING, QUOTE, UNQUOTE, NEC.

8 **THE COURT:** OKAY. SLOW DOWN, MR. MEAN -- MEENAN.
9 SORRY.

10 GO AHEAD. I'M JUST LOOKING AT THE COURT REPORTER'S TAPE,
11 SO I'M JUST SUGGESTING YOU SLOW DOWN.

12 KEEP GOING.

13 **MR. MEENAN:** WHEREAS IPP PARAGRAPH 155 SIMILARLY
14 RELATES TO A MEETING ON DECEMBER 5TH, 2008, BUT ALLEGES THAT
15 NEC TOKIN CORPORATION WAS THE INVOLVED ENTITY.

16 **THE COURT:** AND THEREFORE...?

17 **MR. MEENAN:** THEREFORE, WHEREAS PLAINTIFFS ASK THIS
18 COURT TO INFER THAT -- THAT ALLEGATIONS RELATING TO NEC SHOULD
19 BE INTERPRETED TO RELATE TO NEC TOKIN CORPORATION, I WOULD
20 SUBMIT THAT THAT WOULD BE AN UNREASONABLE INFERENCE AND THAT
21 COURT SHOULD NOT DO SO.

22 **THE COURT:** OKAY. RESPONSE?

23 **MR. SEAYER:** THANK YOU, YOUR HONOR.

24 I'LL FOCUS ON ONE -- ONE ALLEGATION ABOUT ONE EVENT. IT'S
25 FOUND AT THE INDIRECT PURCHASER COMPLAINT AT PARAGRAPH 110.

1 AND JUST SO WE'RE CLEAR, WE'RE TALKING ABOUT NEC CORPORATION'S
2 MOTION. THEY STAND A LITTLE BIT APART. THEY'RE THE ACTUAL
3 PARENT CORPORATION. THE SUBSIDIARY NEC TOKIN IS NOT
4 CONTESTING PLAUSIBILITY OF CONSPIRACY.

5 NEC CORPORATION IS HEADQUARTERED IN TOKYO. THAT'S
6 IMPORTANT. I'LL GET BACK TO THAT IN ONE SECOND. EXCUSE ME.
7 NEC CORPORATION, IF I MISSPOKE, IS IN TOKYO. NEC TOKIN IS
8 IN -- IN MIYAGI, JAPAN. THAT'S AT DIRECT PURCHASER COMPLAINT
9 PARAGRAPHS 53 TO 54. AND NEITHER OF THESE NEC ENTITIES HAVE
10 PRODUCED ANY DOCUMENTS TO THE DOJ OR TO PLAINTIFFS, SO, YOU
11 KNOW, WE'RE KIND OF BATTLING THIS MOTION WITH ONE HAND TIED
12 BEHIND OUR BACKS, SO IT'S OBVIOUS I'M THE GUY TO ARGUE THIS.

13 **UNIDENTIFIED SPEAKER:** NO PUN INTENDED.

14 (LAUGHTER.)

15 **MR. SEAYER:** SO PARAGRAPH 110, LET'S GET RIGHT TO
16 THAT. THAT'S A SAMSUNG DOCUMENT. IT'S MEMORANDA (SIC) FROM
17 SAMSUNG, PRODUCED BY THEM. IT'S MINUTES OF A MEETING -- WE
18 SAY -- WE CLAIM -- ALLEGE THAT IT'S WITH NEC EXECUTIVES. AND
19 THIS ISN'T A PLEADING ARTIFICE. THIS ISN'T A DEFINITIONAL
20 GAME. THAT'S WHAT THE DOCUMENT SAYS. NEC.

21 THAT -- IT DOES OPEN THE QUESTION, WHICH -- WHICH NEC? IS
22 IT THE PARENT CORPORATION IN TOKYO? OR AS IT NEC TOKIN, WHICH
23 IS LOCATED IN MIYAGI, JAPAN.

24 WELL, WE THINK IT'S IMPORTANT. THE DOCUMENT SAYS THE
25 MEETING TAKES PLACE IN TOKYO, NOT MIYAGI. AND THE DOCUMENT

1 REFERS TO SALES THAT ARE GOING TO BE MADE THROUGH NEC
2 CORPORATION. AGAIN, THAT'S PARAGRAPH 110 OF THE IPP
3 COMPLAINT.

4 IT'S NOT A HUNDRED PERCENT SURE. WE RECOGNIZE THAT. ALL
5 WE'RE ASKING FOR IS THAT THE INFERENCE GO OUR WAY, AS IT
6 SHOULD, AND THE SOLUTION HERE ISN'T TO DISMISS NEC
7 CORPORATION. IT'S TO ALLOW US TO GET TO DISCOVERY AS PART AND
8 PARCEL OF DISCOVERY IN THE CASE. IT WILL CERTAINLY GET TO THE
9 BOTTOM OF NEC CORPORATION'S KNOWING PARTICIPATION OR LACK
10 THEREOF. THANK YOU.

11 AND -- AND ON THIS BASIS WE ASK THAT THE COURT DENY NEC'S
12 MOTION.

13 **THE COURT:** SO I TAKE IT AGAIN, IF AT THIS JUNCTURE,
14 I GRANTED WITH LEAVE TO AMEND, YOU DON'T HAVE ANY OTHER
15 ALLEGATIONS THAT YOU'D BE ABLE TO ALLEGE WITH RESPECT TO THIS
16 ISSUE.

17 **MR. SEAYER:** THAT'S TRUE, YOUR HONOR.

18 **MR. MEENAN:** YOUR HONOR, I WOULD LIKE -- EXCUSE ME.

19 **THE COURT:** AND WHEN IS THE PRODUCTION, IF ANY, FROM
20 NEC TOKIN TO OCCUR?

21 **MR. SEAYER:** TO MY KNOWLEDGE, THERE'S NONE TEED UP.
22 I THINK THEY'VE SAID THAT THEY DIDN'T -- THEY DIDN'T RECEIVE A
23 SUBPOENA. IF -- I DON'T WANT TO -- THE WORDING IS MAYBE NOT
24 EXACT, BUT IT'S TO THAT EFFECT.

25 BUT AS MY COLLEAGUE MR. FRIEDMAN MENTIONED, THEY WOULDN'T

1 RECEIVE A SUBPOENA SO IT'S A BIT -- IT'S A BIT OF A STRATEGIC
2 STATEMENT TO SAY THEY DIDN'T RECEIVE A SUBPOENA IN THIS CASE
3 TO IMPLY THEY WERE NEVER OF INTEREST TO THE DEPARTMENT OF
4 JUSTICE. WE DON'T KNOW THAT. MAYBE THEY WEREN'T, BUT THEY WE
5 THINK THEY WOULD HAVE BEEN, JUST THEY CAN'T BE SUBPOENAED.

6 **THE COURT:** ALL RIGHT. MR. MEENAN?

7 **MR. MEENAN:** TWO POINTS, YOUR HONOR. THE FIRST WITH
8 RESPECT TO THEIR PRODUCTION OF DOCUMENTS, MR. SEAVER'S CORRECT
9 THAT NEITHER NEC CORPORATION NOR NEC TOKIN CORPORATION
10 RECEIVED A SUBPOENA FROM THE DOJ OR PARTICIPATED IN THE GRAND
11 JURY INVESTIGATION.

12 NEC TOKIN AMERICA INCORPORATION, HOWEVER, DID RECEIVE A
13 SUBPOENA, DID PRODUCE DOCUMENTS. WE -- NEC CORPORATION AND
14 NEC TOKIN CORPORATION RECEIVED A REQUEST FOR PRODUCTION OF
15 DOCUMENTS, AND NEC CORPORATION AND TOKIN CORPORATION HAVE
16 COMPLETED THEIR PRODUCTION OF RELEVANT DOCUMENTS THAT NEC
17 TOKIN OF AMERICA PRODUCED TO THE DEPARTMENT OF JUSTICE.

18 MY SECOND POINT, YOUR HONOR, IS WITH RESPECT TO THE
19 PARAGRAPH THAT MR. SEAVER DREW THIS COURT'S ATTENTION TO,
20 PARAGRAPH 110 OF THE IPP COMPLAINT. MY READING IS A LITTLE
21 BIT DIFFERENT.

22 I'M LOOKING AT PAGE 44, LINE 16, WHICH, IN FACT, STATES
23 THAT, QUOTE, THEY MET FROM 1:00 O'CLOCK TO 2:40 P.M. ON THE
24 TENTH FLOOR OF THE NEC TOKIN CONFERENCE ROOM IN CHIYODA,
25 TOKYO. I BELIEVE THAT STATEMENT MAKES CLEAR THAT THE -- THAT

1 THE MEETING TOOK PLACE AT NEC TOKIN OFFICES, AND ANY INFERENCE
2 TO THE CONTRARY WOULD BE UNREASONABLE.

3 **MR. SEAYER:** JUST ON THAT POINT, I DON'T KNOW WHY
4 THEY NAME THEIR CONFERENCE ROOM "NEC TOKIN." LOTS OF PEOPLE
5 NAME THEIR CONFERENCE ROOMS DIFFERENT THINGS. BUT IT DOES SAY
6 IT'S IN TOKYO, WHERE, AS WE ALLEGE, THAT'S WHERE NEC
7 CORPORATION IS, AND NOT IN THE OTHER JAPANESE CITY, MIYAGI.

8 AGAIN, IT'S COMPETING INTERESTS, SO I WON'T BELABOR THAT
9 POINT.

10 **THE COURT:** OKAY. ANYTHING ELSE ON THIS MOTION?

11 **MR. MEENAN:** NO, YOUR HONOR. THANK YOU FOR YOUR
12 TIME.

13 **MR. SEAYER:** NO, THANK YOU.

14 **THE COURT:** PANASONIC.

15 ARE WE GOING TO HAVE ANY WOMEN ARGUE THESE MOTIONS AT SOME
16 POINT, GENTLEMEN?

17 **MS. MEJIA:** I AM, YOUR HONOR.

18 **THE COURT:** THANK YOU, MS. MEJIA.

19 ALL RIGHT. COME ON. PANASONIC.

20 **MR. AMATO:** JEFFREY AMATO FROM WINSTON & STRAWN FOR
21 PANASONIC CORPORATION OF NORTH AMERICA AND SANYO NORTH AMERICA
22 CORPORATION.

23 **THE COURT:** ALL RIGHT. AND WE HAVE MR. FRIEDMAN
24 AGAIN.

25 GO AHEAD, MR. AMATO.

1 **MR. AMATO:** YOUR HONOR, I'VE PRODUCED SOME SLIDES
2 THAT WOULD FACILITATE THE ARGUMENT. HOPE TO BE BRIEF. AND
3 I -- I DON'T WANT TO BELABOR THE POINTS THAT HAVE BEEN
4 REPEATED BY THE OTHER DEFENDANTS, BUT I DO WANT TO RESPOND TO
5 SOME OF THE THINGS THAT THE PLAINTIFFS MENTIONED IN THEIR
6 ARGUMENTS THAT APPLY GENERALLY.

7 **THE COURT:** WHY IS THAT?

8 **MR. AMATO:** BECAUSE --

9 **THE COURT:** I'M HERE TO HEAR ABOUT PANASONIC,
10 PANASONIC ONLY. MR. KESSLER DID A FINE JOB ON BEHALF OF THE
11 JOINT MOTIONS.

12 **MR. AMATO:** THANK YOU, YOUR HONOR.

13 **THE COURT:** SO WHY DO I WANTED TO HEAR IT AGAIN?

14 **MR. AMATO:** YOUR HONOR, I JUST WANTED TO DIRECT YOUR
15 ATTENTION TO YOUR -- YOUR ORDER OF LAST TIME THAT DISMISSED
16 THE AMERICAN SUBSIDIARIES AND --

17 (SIMULTANEOUS COLLOQUY.)

18 **THE COURT:** I WROTE IT. I WILL READ IT AGAIN.

19 **MR. AMATO:** -- AT FOOTNOTE 13 --

20 **THE COURT:** OKAY.

21 **MR. AMATO:** -- THE PLAINTIFFS HAD ARGUED THAT THEY
22 JUST NEED TO ALLEGE A SLIGHT CONNECTION FOR THE AMERICAN
23 SUBSIDIARIES BECAUSE OF THE REST OF CONSPIRACY WAS PLAUSIBLE.
24 AND YOU HAD FOUND THAT THAT WAS FUNDAMENTALLY WRONG AND
25 AGAINST PRECEDENT. AND I SUGGEST THAT THEY'RE MAKING THE SAME

1 ARGUMENTS HERE AND THAT THE ALLEGATIONS THEY HAVE PLED AGAINST
2 PANASONIC NORTH AMERICA AND SANYO NORTH AMERICA DO NOT SHOW A
3 CONSCIOUS AGREEMENT TO JOIN THE CONSPIRACY.

4 AND --

5 **THE COURT:** OKAY. SO FOCUS ON THE ALLEGATIONS.
6 FOCUS.

7 **MR. AMATO:** YES, YOUR HONOR, I WILL.

8 **THE COURT:** FOCUS, FOCUS.

9 **MR. AMATO:** AND HERE, IT IS GOOD TO CONTRAST WHAT WAS
10 ALLEGED IN LCD AND CRT THAT WAS FOUND SUFFICIENT AND COMPARE
11 IT TO WHAT HAS BEEN ALLEGED AGAINST PNA AND SNA HERE.

12 IN LCD AND CRT, THERE WERE --

13 **THE COURT:** MR. AMATO, DID YOU LITIGATE THAT CASE --
14 THOSE CASES?

15 **MR. AMATO:** YOUR HONOR, WE'RE COUNSEL OF RECORD FOR
16 PANASONIC IN CRT.

17 **THE COURT:** ALL RIGHT. THANK YOU.

18 **MR. AMATO:** AND I'VE GONE AND I'VE LOOKED THROUGH THE
19 COMPLAINTS IN BOTH CASES. AND IN THERE, THERE ARE NUMEROUS
20 ALLEGATIONS OF AMERICAN SUBSIDIARIES PARTICIPATING IN MEETINGS
21 IN THE U.S. THERE ARE DISCUSSIONS OF COLLUSIVE MEETINGS AMONG
22 THE U.S. SUBSIDIARIES. THERE'S ALLEGATIONS THAT THE U.S.
23 SUBSIDIARIES KNOWINGLY IMPLEMENTED THE CONSPIRATORIAL PRICING.

24 THAT'S MARKET CONTRAST TO WHAT WE HAVE IN THIS COMPLAINT
25 AGAINST PANASONIC NORTH AMERICA AND SANYO NORTH AMERICA.

1 THERE ARE SCATTERED SNIPPETS OF ISOLATED EVENTS THROUGHOUT A
2 DECADE THAT HAVE BEEN TOOK (SIC) OUT OF THE 74,000 DOCUMENTS
3 PRODUCED BY PNA AND SNA. AND THE ALLEGATIONS REALLY REFLECT
4 CONFUSION ABOUT WHAT WAS GOING ON, IF ANYTHING, OVER IN ASIA.

5 IT DOESN'T SHOW ANYTHING ABOUT CONSCIOUS DECISION TO
6 PARTICIPATE IN THAT CONSPIRACY. IT SHOWS, FOR EXAMPLE, A
7 SOJOURNING EMPLOYEE OF SANYO ELECTRIC COMING TO AMERICA AND
8 GOING BACK TO ASIA AND MEETING WITH A DRINKING BUDDY TO GET
9 INFORMATION.

10 THE --

11 **THE COURT:** AND YOU'RE SUGGESTING THAT --

12 (SIMULTANEOUS COLLOQUY.)

13 **THE COURT:** YOU'RE SUGGESTING THAT CONSPIRATORIAL
14 CONDUCT CANNOT OCCUR OVER DRINKS IN A BAR, PERHAPS ON A GOLF
15 COURSE, OR PERHAPS IN OTHER KINDS OF SOCIAL ARENAS?

16 **MR. AMATO:** IT CAN CERTAINLY OCCUR AT ALL THOSE
17 ARENAS, BUT THE NOTES THAT REFLECT WHAT HAPPENED IN THE
18 MEETINGS HE HAD SHOW THAT HE HAD NO KNOWLEDGE OF WHAT WAS
19 GOING ON IN THE VERY INSTITUTIONALIZED MEETINGS THAT HAVE BEEN
20 ALLEGED TO FORM THE HEART OF THE CONSPIRACY HERE, AND I THINK
21 THAT MR. FRIEDMAN REFERENCED BEFORE THE SERIAL MEETINGS WITH
22 SDI.

23 ALL OF THE ALLEGATIONS AGAINST SANYO NORTH AMERICA AND
24 PANASONIC NORTH AMERICA DO NOT EVEN COME CLOSE TO ALLEGING
25 KNOWLEDGE OR PARTICIPATION IN THESE MEETINGS.

1 **MR. FRIEDMAN:** YOUR HONOR, JEFF FRIEDMAN. VERY
2 BRIEFLY, 'CAUSE THE COURT'S HEARD A LOT, SO I'M NOT GOING TO
3 REPEAT, BUT I WOULD JUST -- AGAIN, WE'LL POINT TO THE CHART.
4 THE COURT AND THE STAFF CAN -- CAN READ THE PARAGRAPHS, BUT I
5 DO WANT TO HIGHLIGHT 218 IN THE INDIRECT PURCHASER COMPLAINT
6 FOR A REASON. AND -- AND I'LL JUST GIVE YOU THE REASON, AND
7 THAT IS IT -- IT SHOWS YOU, YOUR HONOR, OF THE
8 OPERATIONALIZING THAT I DISCUSSED WITH THE COURT.

9 IT JUST ANOTHER PRIME EXAMPLE. IT'S SOUND LIKE
10 MR. AMATO'S SAYING IN ORDER TO PARTICIPATE, YOU HAVE TO PUT
11 EACH DEFENDANT IN A ROOM CONSPIRING, WHICH WE ALL KNOW -- AND
12 THE COURT KNOWS ITS OWN ORDER, KNOWS THE LAW. THAT'S NOT
13 REQUIRED.

14 THERE'S -- DIFFERENT COMPONENT PARTS CONSTITUTE A
15 CONSPIRACY. AND SO YOU HAVE IN 218 -- AGAIN, WE'RE GIVING YOU
16 DETAILS OF A JULY 7, 2010 PANASONIC NORTH AMERICA
17 COMMUNICATION ABOUT GETTING CONFIDENTIAL PRICING INFORMATION
18 FROM COMPETITOR SONY. AND THEY'RE GOING TO USE THAT
19 INFORMATION, YOUR HONOR, WITH RESPECT TO NEGOTIATIONS WITH A
20 VENDOR BLACK AND DECKER. AND SO -- A CUSTOMER. EXCUSE ME.

21 AND SO THIS IS -- THIS IS THE SAMPLE BEFORE THE BREAK THAT
22 I TALKED TO YOU ABOUT. THERE'S A LOT OF OTHER ALLEGATIONS YOU
23 CAN SEE BUT I JUST WANTED TO HIGHLIGHT THAT TO -- TO
24 ILLUSTRATE THE POINT I MADE EARLIER.

25 THANK YOU, YOUR HONOR. WE'D SUBMIT.

1 **MR. AMATO:** VERY BRIEFLY IN RESPONSE, THIS IS A GOOD
2 EXAMPLE OF HOW MERE INFERENCES OF THE RECEIPT OF INFORMATION
3 FROM THE PARENTS DOES NOT SHOW THAT THE SUBSIDIARY ACTUALLY
4 AFFIRMATIVELY AGREED TO JOIN IN IT BECAUSE IT'S WRONG WHEN
5 YOU'RE TALKING ABOUT A CELL CONSPIRACY OVER -- AT THE CELL
6 MANUFACTURERS LOCATED IN JAPAN AND KOREA. WHEN THEY ARE
7 SETTING PRICES ALLEGEDLY IN A CONSPIRATORIAL AND CARTEL
8 FASHION, THERE'S NO NEED FOR THE U.S. SALES SUBSIDIARIES TO
9 PARTICIPATE IN THAT.

10 **THE COURT:** WEREN'T THEY --

11 **MR. AMATO:** THEY ONLY NEED TO RECEIVE THE PRICING
12 FROM THE PARENTS.

13 **THE COURT:** AND THEN ACT ON IT. AND THEN ACT ON IT.

14 **MR. AMATO:** BUT THAT DOESN'T --

15 (SIMULTANEOUS COLLOQUY.)

16 **MR. AMATO:** -- DOESN'T MEAN THEY JOINED THE
17 CONSPIRACY.

18 **THE COURT:** ANYTHING ELSE?

19 **MR. AMATO:** NO, YOUR HONOR. THANK YOU.

20 **MR. FRIEDMAN:** SUBMITTED, YOUR HONOR.

21 **THE COURT:** SONY ENERGY DEVICES.

22 (PAUSE IN THE PROCEEDINGS.)

23 **THE COURT:** MS. MEJIA, YOU MAY PROCEED.

24 **MS. MEJIA:** GOOD MORNING, YOUR HONOR. BEATRICE MEJIA
25 ON BEHALF OF SONY ELECTRONICS AND SONY ENERGY DEVICES.

1 YOUR HONOR, WE'VE HEARD A LOT OF ARGUMENT THIS MORNING AND
2 IN THE INTEREST OF TIME, WE WILL SUBMIT OUR ARGUMENT ON SONY
3 ELECTRONICS ON THE PAPER -- ON THE PAPERS.

4 I BRIEFLY WANT TO ADDRESS, HOWEVER, THE ALLEGATIONS AS TO
5 SONY ENERGY -- ENERGY DEVICES. WE JUST WANT TO HIGHLIGHT A
6 FEW IMPORTANT FACTS THAT SHOULD BE TAKEN INTO ACCOUNT IN
7 EVALUATING PLAINTIFFS' ALLEGATIONS.

8 ONE, SONY -- SONY ENERGY DEVICES -- I'LL REFER TO AS
9 "SEND" FROM HERE ON -- DID NOT COME INTO EXISTENCE UNTIL 2004,
10 SO ANY ALLEGATIONS PRIOR TO THAT POINT ARE IRRELEVANT.

11 THEY'RE -- BETWEEN 2004 AND 2009, SEND WAS RESPONSIBLE FOR
12 MANUFACTURING CELLS IN PACKS. AFTER -- AFTER 2009, THE
13 REMAINDER OF THE -- OF BATTERY BUSINESS WAS -- WAS TAKEN OVER
14 BY SEND. THERE ARE NO SUBSTANTIVE ALLEGATIONS WITH RESPECT TO
15 SEND AFTER 2004.

16 THE ONLY ONE IS DATED AFTER 2009, AND I WANT TO DRAW THE
17 COURT'S ATTENTION TO IT BECAUSE I THINK IT'S IMPORTANT TO
18 FOCUS ON THE ACTUAL ALLEGATION. AND I'D LIKE TO REFER TO
19 PARAGRAPH 229 OF THE IPP COMPLAINT. THE ALLEGATION SAYS, ON
20 MAY 9TH, 2010, ROBERT MCCAUL, SONY ELECTRONICS SAN JOSE,
21 CALIFORNIA WROTE TO KOICHI FUKATA, MANAGER OF SONY ENERGY
22 DEVICES OF JAPAN, REGARDING THE CUSTOMER RIM THAT WE -- THAT,
23 QUOTE, WE REQUEST THAT YOU CONSIDER A PRICE COMPETITIVE WITH
24 SANYO. SANYO PRICE EQUALS BELOW THREE FIFTY, END QUOTE.

25 YOUR HONOR, THAT'S MERELY A COMMUNICATION WITH RESPECT TO

1 OBTAINING A PRICE COMPETITIVE TO SANYO. NO EVIDENCE OF ANY
2 CONSPIRATAL (PHONETIC) ACTIVITY, MUCH LESS A CONSCIOUS
3 DECISION TO PARTICIPATE IN THE CONSPIRACY.

4 **THE COURT:** RESPONSE.

5 **MR. SEAYER:** ALL RIGHT. WE'LL -- DOING BOTH -- TODD
6 SEAYER FOR PLAINTIFFS, DOING BOTH SONY ELECTRONICS
7 INCORPORATED AND SONY ENERGY DEVICES.

8 PLAINTIFFS WILL ALSO SUBMIT ON SONY ELECTRONICS
9 INCORPORATED. AND OF THE ALLEGATIONS WE'VE PROVIDED THAT
10 WE'VE HIGHLIGHTED IN THE CHART, I WOULD IN PARTICULAR JUST
11 FOCUS ON DIRECT PURCHASERS, PARAGRAPH 226; INDIRECT
12 PURCHASERS, 220. IT'S THE -- THE SAME EVENT BEING ALLEGED IN
13 BOTH COMPLAINTS. AND THEN ALSO THE DIRECT PARAGRAPH -- DIRECT
14 PURCHASER PLAINTIFFS PARAGRAPHS 230 THROUGH 233.

15 OF ALL THE DIFFERENT PARAGRAPHS -- AND THERE'S QUITE -- WE
16 THINK QUITE A BIT OF MEAT FOR SONY ELECTRONICS INCORPORATED,
17 THOSE ARE THE ONES WE'D ASK THE COURT TO FOCUS ON IN
18 PARTICULAR.

19 SO SONY ENERGY DEVICE DEVICES, THIS IS A JAPANESE COMPANY.
20 IT'S WHOLLY OWNED BY THE PARENT SONY CORPORATION IN JAPAN.
21 HERE, NEITHER -- BEARS NOTING THAT NEITHER SONY ENERGY DEVICE
22 NOR SONY CORPORATION HAVE PRODUCED DOCUMENTS TO THE DOJ OR THE
23 PLAINTIFFS, SO I GO BACK TO MY FIGHT WITH ONE ARM ANALOGY, BUT
24 WE'D LIKE TO FOCUS ON AN EVENT INVOLVING SONY -- WHAT WE
25 BELIEVE IS SONY ENERGY DEVICES. IT'S IN THE DIRECT COMPLAINT

1 AT 131. AND IT'S THE SAME EVENT DESCRIBED IN THE INDIRECT
2 COMPLAINT AT PARAGRAPH 79(B)(II).

3 THESE ARE ALLEGATIONS -- IT COMES -- THEY COME FROM LG,
4 SANYO, AND SAMSUNG DOCUMENTS. AND THE ALLEGATIONS -- IT DOES
5 SAY "SONY." IT DOESN'T SAY "SONY CORPORATION." DOESN'T SAY
6 "SONY ENERGY DEVICES." AT THIS STAGE, WE THINK THE REFERENCES
7 TO "SONY" HERE INCLUDE SONY ENERGY DEVICES. AND THIS GETS US
8 TO SOME CONFUSION ABOUT SONY ENERGY DEVICES AND WHEN IT -- IT
9 WAS CREATED OR CAME INTO EXISTENCE OR BEGAN ITS OPERATIONS.

10 THE PLEADING -- THE DIRECT PURCHASER COMPLAINT, PARAGRAPH
11 45, SAYS THAT -- IT DOESN'T SAY ANYTHING ABOUT WHEN THE
12 COMPANY WAS CREATED OR FOUNDED OR CAME INTO EXISTENCE. IT
13 DOES SAY THAT AS OF SOME POINT IN 2009, SONY CORPORATION, THE
14 PARENT, CONCENTRATED THE BULK, IF NOT ALL OF THE LITHIUM ION
15 BATTERY BUSINESS INTO ITS SUBSIDIARY SONY ENERGY DEVICES IN
16 JAPAN.

17 WE FIND OURSELVES WITH QUITE A BIT OF EXTRINSIC
18 INFORMATION, EXTRINSIC TO THE COMPLAINT THAT'S -- MY
19 COLLEAGUES AT SONY HAVE PROVIDED THE COURT MOST -- IN
20 PARTICULAR ON THEIR REPLY BRIEF, WHICH WE DIDN'T HAVE A CHANCE
21 TO RESPOND TO, AT FOOTNOTE 1, IT CITES A WEBSITE. AND IT'S
22 NOT SONY ENERGY DEVICES WEBSITE, BUT IT CITES A WEBSITE AND
23 ASKS THE COURT TO CONSIDER THIS AS A FACT.

24 WE DON'T THINK THAT'S PROPER, BUT IF I COULD ADDRESS IT,
25 IT -- THEY SAY THAT BASED ON THIS CITE -- AND I HAVE IT. I

1 CAN HAND IT UP IF YOUR HONOR WISHES -- THAT THE COMPANY, AS WE
2 HEARD IS -- DIDN'T EXIST UNTIL 2004. AND IN THEIR REPLY
3 BRIEF, THEY SAY IT DIDN'T EXIST UNTIL 2004 AND THEN THEY BACK
4 AWAY FROM THAT A LITTLE BIT AND SAY, WELL, IT DIDN'T BEGIN
5 OPERATIONS UNTIL 2004. YOU COULD IMAGINE -- WE SEE THIS REPLY
6 BRIEF. PIQUED OUR INTEREST. SO WE WENT TO THE SONY ENERGY
7 DEVICES WEBSITE, AND THIS -- AGAIN, THIS IS NOT IN THE
8 PLEADINGS. AND I HAVE THAT HERE FOR YOU AND IT SAYS THE
9 COMPANY'S FOUNDED IN 1975. WHAT DOES ALL THIS MEAN?

10 WELL, I THINK WE SHOULD JUST GO BACK TO THE PLEADING,
11 WHICH IS SILENT ON THE CREATION OF THE COMPANY, BUT WHAT IT
12 MEANS IS, AS WE'VE SEEN ALREADY, IS THAT WE THINK WE GET THAT
13 INFERENCE. THE COMPANY'S IN EXISTENCE AT LEAST ON THE FACE OF
14 OUR PLEADINGS, IT EXISTS. AND SO THE -- THE ALLEGATIONS THAT
15 ARE DESCRIBED AT THE PARAGRAPHS I HIGHLIGHTED ARE -- APPLY TO
16 AND DESCRIBE THE CONDUCT OF SONY ENERGY DEVICES.

17 AND SO IT'S A -- REALLY, IT'S A CONSPIRATORIAL MEETING,
18 COMES PRIMARILY FROM LG DOCUMENTS, AND IT SAYS, QUOTE, SONY
19 AND LG AGREED, NOT --" JUST QUOTES IS "SONY." THE REST OF
20 THIS, I'M PARAPHRASING. THEY AGREED NOT TO ENGAGE IN PRICE
21 COMPETITION, AND LG PLEDGED TO FOLLOW SONY'S FORTHCOMING PRICE
22 INCREASES. THAT'S WHAT WE HAVE FOR SONY ENERGY DEVICES.

23 I'M HAPPY TO -- I WILL AT LEAST SHARE IT WITH MY
24 COLLEAGUE, THE WEBSITES I'M REFERRING TO. AND IF YOUR HONOR
25 LIKES, I'LL HAND THEM UP AS WELL.

1 **THE COURT:** RESPONSE?

2 **MS. MEJIA:** YES, YOUR HONOR.

3 OUR -- OUR REPRESENTATION TO THE COURT IS THAT SONY ENERGY
4 DEVICES CAME INTO OPERATION IN 2004. THERE WERE PREDECESSOR
5 ENTITIES PRIOR TO THAT POINT. THERE'S NO ALLEGATION OF
6 SUCCESSOR LIABILITY HERE AT ALL. BUT EVEN FOCUSING ON THE
7 2002 ALLEGATIONS THAT PLAINTIFFS RELY ON, IF YOU LOOK AT THE
8 INDIRECT PURCHASER COMPLAINT, 79(B) ROMAN AT II, WHICH IS I
9 BELIEVE ONE OF THE ALLEGATIONS THAT COUNSEL REFERRED TO,
10 THE -- THE MEETING THERE OR -- THE ALLEGATION OR THE QUOTE IS
11 THAT THERE WAS A MEETING AT WHICH A PROPOSAL FOR THE
12 ACQUISITION OF SONY PRISMATIC K5 LINE AND REGARDING K5EBP
13 HONG, CAME TO JAPAN AGAIN AND MET PEOPLE SUCH AS MR. KATAYAMA.

14 SO THERE'S NOTHING THERE ABOUT A CONSPIRACY, AN AGREEMENT,
15 OR EVEN A MENTION OF PRICES. IT'S SIMPLY A DISCUSSION ABOUT
16 ACQUIRING CERTAIN ASSETS.

17 THE OTHER PRE-2004 ALLEGATION THAT I BELIEVE COUNSEL
18 REFERRED TO, IF THE COURT WILL GIVE ME A SECOND HERE --

19 (PAUSE IN THE PROCEEDINGS.)

20 **MS. MEJIA:** -- IS AT PARAGRAPH 131 OF THE DPP
21 COMPLAINT. AND, AGAIN, THERE ARE, THERE'S AN ALLEGATION OF A
22 MEETING BETWEEN SONY AND LG. THERE IS NO MENTION OF SONY
23 ENERGY DEVICES, WHATSOEVER.

24 THERE'S A REFERENCE TO MEETING -- PERSONNEL FROM SONY
25 CORPORATION CORE TECHNOLOGY AND NETWORK COMPANY AND VARIOUS

1 EMPLOYEES OF THAT COMPANY.

2 THERE IS NO MENTION WHATSOEVER OF SONY ENERGY DEVICES.

3 **THE COURT:** YOU WANT TO RESPOND TO THAT, MR. SEAYER?

4 **MR. SEAYER:** NO. WE'LL REST ON OUR PAPERS, YOUR
5 HONOR.

6 (PAUSE IN THE PROCEEDINGS.)

7 **MR. SEAYER:** YOUR HONOR JUST --

8 **THE COURT:** DO YOU WANT TO -- TO RESPOND TO THE NOTE
9 BY MR. SEAYER, MS. MEJIA, THAT THE SONY WEBSITE FOR SONY
10 ENERGY DEVICES INDICATES IT WAS FOUNDED IN 1975?

11 **MS. MEJIA:** I THINK, YOUR HONOR, THAT REFERS TO
12 PREDECESSOR ENTITIES NOT SONY ENERGY DEVICES.

13 **MR. SEAYER:** AND, YOUR HONOR, PLAINTIFFS REALLY CAN'T
14 RESPOND TO THAT WITHOUT DISCOVERY.

15 **MS. MEJIA:** BUT, AGAIN, YOUR HONOR, TO ELABORATE A
16 LITTLE BIT, THERE IS NO MENTION OF SONY ENERGY DEVICES PRIOR
17 TO 2004 OR ANY PREDECESSOR OF SONY ENERGY DEVICES ASSUMING
18 THAT ANY LIABILITY -- THERE WOULD BE ANY SUCCESSOR LIABILITY.

19 **MR. SEAYER:** UH-HUH. AND ON THAT, THE PARAGRAPH I
20 HIGHLIGHTED, WE BELIEVE IS REFERRING TO SONY ENERGY DEVICES
21 FOR THE REASONS I --

22 **THE COURT:** I UNDERSTAND. AND I ALSO SEE HERE THAT
23 THE HISTORY RIGHT ON THE FACE OF THE DOCUMENT INDICATES THAT
24 THE MERGER FROM PRIOR ENTITIES TO SEND WAS IN 2004.

25 **MR. SEAYER:** CORRECT. I -- I PROVIDED THE ACTUAL

1 PRINTOUT OF THE SITE THAT MY COLLEAGUES AT SONY HAD REFERRED
2 YOUR HONOR, JUST IN FAIRNESS, SO THEY HAD BOTH IF -- I DON'T
3 THINK THIS IS -- EXTRINSIC MATERIAL MEANS ANYTHING, BUT IT --
4 I THINK ALL IT MEANS IS WE STICK WITH THE PLEADINGS AND THEY
5 AREN'T IN THERE, THOSE FACTS, SO THE INFERENCE WE'VE ASKED
6 YOUR -- YOUR HONOR TO AGREE WITH US SHOULD BE DRAWN, WE ASKED
7 THAT YOUR HONOR DO SO AND THE DENY MOTION OF SONY ENERGY
8 DEVICES.

9 **THE COURT:** OKAY. ANYTHING ELSE?

10 **MS. MEJIA:** ONE FINAL COMMENT, YOUR HONOR. TAKING --
11 ASSUMING YOU TAKE THE PLEADINGS AS THEY ARE, THERE IS STILL
12 NOTHING WITH RESPECT TO SONY ENERGY DEVICES THAT WOULD
13 ESTABLISH THAT THEY MADE A CONSCIOUS DECISION TO PARTICIPATE
14 IN THE CONSPIRACY AT ANY POINT.

15 **MR. SEAYER:** THANK YOU.

16 **THE COURT:** ALL RIGHT. SUBMITTED.

17 LAST, TOSHIBA.

18 **MR. CURRAN:** GOOD MORNING, YOUR HONOR. I'M
19 CHRISTOPHER CURRAN FROM WHITE AND CASE FOR TOSHIBA
20 CORPORATION.

21 **MR. FRIEDMAN:** JEFF FRIEDMAN ON BEHALF OF THE
22 INDIRECT PURCHASER PLAINTIFFS, YOUR HONOR.

23 **MR. CURRAN:** YOUR HONOR, TOSHIBA RAISED TWO POINTS IN
24 ITS MOTION TO DISMISS. I PROPOSE STARTING WITH THE TWOMBLY
25 ISSUE.

1 YOUR HONOR, THE CLAIM AGAINST TOSHIBA CORPORATION RESTS
2 UPON ALLEGATIONS OF FIVE BILATERAL MEETINGS; FOUR, WITH
3 SAMSUNG; ONE WITH LG. AND THE PLAINTIFFS ASK YOUR HONOR TO
4 INFER THAT THOSE MEETINGS SUPPORT A CLAIM AGAINST TOSHIBA AS A
5 MEMBER OF THE CONSPIRACY.

6 THERE IS NOT AN ALLEGATION, YOUR HONOR, OF AGREEMENT IN
7 ANY OF THOSE FIVE MEETINGS SO THE PLAINTIFFS ARE RESTING ON AN
8 INFERENCE. I SUGGEST THAT IN LIGHT OF THE RELEVANT STANDARD
9 AND THE WORD "HOLISTIC," WHICH HAS BEEN BANDIED ABOUT A LOT
10 TODAY, THAT THAT INFERENCE IS UNREASONABLE AND THAT THERE ARE
11 MORE COMPELLING AND MORE APPROPRIATE INFERENCES TO BE DRAWN.
12 AND LET ME BE PRECISE.

13 READING THE COMPLAINTS AS A WHOLE, I -- I DIRECT YOUR
14 HONOR'S ATTENTION TO PARAGRAPH 76 OF THE IPP COMPLAINT. AND
15 THERE, THE IPP'S ACKNOWLEDGE THAT ONE OF THE MEETING WITH
16 SAMSUNG, THE LAST ONE IN 2003, THE LAST OF THE FIVE MEETINGS,
17 WAS A MEETING AT WHICH TOSHIBA WAS TRYING TO SELL ITS BATTERY
18 BUSINESS. AND THERE'S A LENGTHY PARAGRAPH THERE, AND I SUBMIT
19 TO YOUR HONOR, THAT THERE'S NOTHING IN THAT PARAGRAPH THAT IS
20 INCONSISTENT WITH AN ARM'S LENGTH TRANSACTION. TOSHIBA TRYING
21 TO SELL ITS BATTERY BUSINESS TO SAMSUNG.

22 THIS, AGAIN, IS THE LAST OF THE FIVE. AND IN THIS
23 PARAGRAPH, 76, THE IPP'S ACKNOWLEDGE THAT TOSHIBA WAS SPEAKING
24 NOT ONLY TO SAMSUNG BUT TO LG, WHO, OF COURSE, IS THE ONLY
25 OTHER PARTY THAT TOSHIBA'S ALLEGED TO HAVE BILATERAL MEETINGS

1 WITH.

2 SO THIS ALLEGATION IS ONE ALLEGATION IN THE COMPLAINT THAT
3 READ HOLISTICALLY GIVES -- SHEDS DIFFERENT LIGHT ON THE
4 MEETINGS THAT THE COMPLAINT -- THAT THE PLAINTIFFS REST UPON.

5 ANOTHER PARAGRAPH -- AND THIS IS A NEW ONE IN THE DPP
6 COMPLAINT, PARAGRAPH 93 -- THAT'S WHERE THE DPP'S NOW
7 ACKNOWLEDGE THAT TOSHIBA WAS A CUSTOMER OF MOST OF THE OTHER
8 DEFENDANTS IN THIS CASE, INCLUDING SAMSUNG AND LG.

9 AND IN FACT, THE DPP'S ACKNOWLEDGE THAT ULTIMATELY IN
10 THE -- IN THE ALLEGED CONSPIRACY PERIOD, TOSHIBA WAS BUYING A
11 HUNDRED PERCENT OF ITS NEEDS FROM SAMSUNG, LG, AND OTHER
12 DEFENDANTS.

13 I SUBMIT TO YOUR HONOR, THAT, OF COURSE, TOSHIBA WAS
14 MEETING WITH THESE COMPANIES BECAUSE IT WAS A CUSTOMER. AND
15 THE ACKNOWLEDGMENT IN THE COMPLAINTS HERE AGAIN SHEDS A
16 DIFFERENT LIGHT ON THE FIVE BILATERAL MEETINGS THAT THE
17 PLAINTIFFS POINT TO.

18 AND, AGAIN, EVERYONE ONE OF THOSE FIVE, FOUR OF THEM ARE
19 WITH SAMSUNG; ONE IS WITH LG. THEY WERE BOTH COUNTER-PARTIES
20 TO PROPOSED SALES TRANSACTIONS, AND THEY WERE BOTH SUPPLIERS
21 OF TOSHIBA.

22 SO IN LIGHT OF THE HOLISTIC READING OF THE COMPLAINTS, I
23 SUBMIT THAT IT'S UNREASONABLE TO REACH THE NEFARIOUS
24 CONCLUSION THAT THESE FIVE BILATERAL MEETINGS SUPPORT THE
25 INCLUSION OF TOSHIBA IN THE CONSPIRACY.

1 I -- I ALSO ADD, YOUR HONOR, AS BACKGROUND, TOSHIBA WAS
2 NOT NAMED IN THE ORIGINAL CLASS ACTIONS THAT LED TO THIS MDL.
3 IT WAS ADDED ONLY AS A LATE-COMER IN THE CONSOLIDATED AMENDED
4 COMPLAINTS. TOSHIBA HAS NO CONVICTION, NO INDICTMENT, NO
5 INFORMATION, AND NO -- NO ENTITY OF TOSHIBA RECEIVED ANY
6 SUBPOENA FROM THE U.S. GOVERNMENT.

7 **THE COURT:** RESPONSE.

8 **MR. FRIEDMAN:** YOUR HONOR, I DON'T BELIEVE YOU CAN
9 CLAIM HOLISTIC READING WITHOUT HOLISTICALLY READING.

10 SO FIRST OF ALL, YOUR HONOR, IF -- WE'LL TAKE MR. CURRAN'S
11 FOCUS ON PARAGRAPH 76 OF THE IPP COMPLAINT, AND HE LEFT OUT OF
12 HIS HOLISTIC READING THAT THE ALLEGATION INCLUDES SAMSUNG
13 STATED DURING THIS MEETING BETWEEN TOSHIBA AND SAMSUNG, THAT,
14 QUOTE, WE HAVE FORMED A CONNECTION FOR A LONG TIME THROUGH
15 LIAISON CONFERENCES WITH TOSHIBA. AND THAT IN ADDITION DURING
16 THIS MEETING, TOSHIBA COMMUNICATED DETAIL CAPACITY AND
17 OPERATING INFORMATION.

18 NOW, HE MAY ARGUE A -- INNOCUOUS INFERENCES THAT THAT WAS
19 PART AND PARCEL TO A SALE NEGOTIATION. AND AS A SIDE, IT
20 SEEMS LIKE MR. CURRAN'S RELYING ON THE FACT THAT TOSHIBA
21 PURCHASED A LARGE PERCENTAGE OF ITS SHARES OF CELLS FROM OTHER
22 COMPANIES WHILE AT THE SAME TIME IS SELLING ITS BATTERY
23 BUSINESS. I DON'T THINK THAT'S INCONSISTENT WITH THE TIME
24 PREDATING THE SALE OR LATER IN THE CONSPIRACY WHERE THEY ARE
25 BUYING CELLS FROM OTHER PARTICIPANTS.

1 BUT I'LL MAKE THIS FURTHER POINT, YOUR HONOR. THAT WAS
2 JULY 15TH, 2003.

3 IF YOU GO BACK HOLISTICALLY AND LOOK AT PARAGRAPH 79,
4 WHICH IS A DISCUSSION WHERE LG, I BELIEVE, IS RELATING THE
5 HISTORY BETWEEN LG AND SONY'S CONSPIRATORIAL COMMUNICATIONS,
6 IT INCLUDES IN, I BELIEVE, 79 -- 79(B)(I), THE DISCUSSION,
7 YOUR HONOR, THAT IS REFERENCING THE SERIES OF MEETINGS THAT
8 WERE OCCURRING -- AGAIN, THIS IS PREDATING THE JULY 15TH
9 MEETING, AND THIS IS IN JULY 2002 -- WHERE IT'S RECOUNTING THE
10 SEQUENTIAL MEETINGS WITH COMPETITORS WHICH WAS FOR THE PURPOSE
11 OF ASKING FOR COOPERATION IN THE BUSINESS.

12 AND SO WHAT YOU HAVE, YOUR HONOR, IS WHAT MR. CURRAN
13 SPINS, AN INFERENCE OF THE 2003 MEETING IS THAT, ONE, HE
14 LEAVES OUT THERE'S HISTORY BETWEEN THESE TWO COMPANIES; TWO,
15 THE HISTORY INCLUDES INFERENCES THAT THE PRIOR MEETINGS THAT
16 THEY ACKNOWLEDGE WERE LONG-STANDING, WERE WITHIN HOLISTICALLY
17 SEQUENTIAL MEETINGS THAT WERE GOING ON AMONGST TOSHIBA, THE
18 COMPETITORS, TO FIX PRICES.

19 AND SO THE OTHER THING I WILL ALSO POINT OUT TO THE COURT
20 HOLISTICALLY AND MR. CURRAN LEAVES OUT IN THAT COMMENT IS THAT
21 WE ALSO PLEAD IN PARAGRAPH 71 THAT BETWEEN OCTOBER 22ND, 2002
22 AND OCTOBER 25TH, 2002, SAMSUNG CONDUCTED ANOTHER ROUND OF
23 MEETINGS. I DON'T NEED TO TAKE THE COURT THROUGH IT ALL.

24 BUT IN THIS, IT'S DETAILED, YOUR HONOR, WHERE SAMSUNG AND
25 TOSHIBA HAVE A MEETING IN WHICH THERE'S DISCUSSIONS OF 2003

1 FUTURE PRICES, CLASSIC DISCUSSIONS THAT WE BELIEVE ARE
2 EVIDENCE OF AN ANTI-COMPETITIVE MEETINGS OF MINDS TO RESTRAIN
3 THOSE FUTURE PRICES.

4 SO I WOULD SIMPLY SAY, YOUR HONOR, THAT THAT'S SUFFICIENT.
5 WE'D SUBMIT ON THAT WITH RESPECT TO THAT PART OF THE ARGUMENT.

6 **MR. CURRAN:** TO RESPOND TO THAT, YOUR HONOR, I'LL
7 ADDRESS THE THREE PARAGRAPHS THAT MR. FRIEDMAN RELIES UPON.
8 76, EVERYTHING IN THERE IS CONSISTENT WITH AN ARM'S LENGTH
9 SALE OF A BUSINESS. AND I GUESS HE'S INFERRING WITH A
10 JAUNDICED EYE SOMETHING FROM THAT LAST QUOTE ABOUT WE HAVE
11 FORMED A CONNECTION FOR A LONG TIME THROUGH LIAISON
12 CONFERENCES WITH TOSHIBA.

13 YOUR HONOR, BUSINESSES HAVE A LOT OF RELATIONSHIPS,
14 INCLUDING, AS WE'VE ALREADY ESTABLISHED FROM THESE COMPLAINTS,
15 SALES TRANSACTIONS BETWEEN THEM. COMPANIES LIKE TOSHIBA AND
16 SAMSUNG DO BUSINESS ON A LOT OF DIFFERENT LEVELS, HUNDREDS OF
17 TRANSACTIONS EVERY YEAR. SO THERE'S NOTHING NEFARIOUS OR TO
18 BE INFERRED FROM -- FROM THAT PARAGRAPH.

19 AS TO -- AS TO PARAGRAPH 79, WHICH MR. FRIEDMAN
20 SURPRISINGLY REFERRED TO, THAT -- THAT (B)(I) REFERS TO A
21 MEETING BETWEEN LG AND SONY, AND IT HAPPENS TO MENTION IN
22 PASSING THAT THOSE TWO DISCUSSED COOPERATION WHEN THE --
23 APPARENTLY THE LG PERSON WAS ON A BUSINESS TRIP WHERE HE MET
24 WITH TOSHIBA.

25 SO I GUESS -- I GUESS MR. FRIEDMAN IS SUGGESTING THAT IF

1 SOMEONE ENGAGES IN A COLLUSIVE DISCUSSION AND MEETS WITH YOU
2 ON THE SAME BUSINESS, WELL, THEN YOU'RE KIND OF ROPED IN. I
3 DON'T THINK THAT'S A SUPPORTABLE OR REASONABLE INFERENCE TO --
4 TO USE TWOMBLY.

5 AND THEN UNDER 70 -- UNDER -- I THINK HE -- THE FINAL WAS
6 PARAGRAPH 71, OF COURSE, THERE'S GOING TO BE DISCUSSION OF
7 THAT -- SOME LEVEL OF PRICING WHEN SAMSUNG IS A SUPPLIER TO
8 TOSHIBA.

9 CUSTOMERS AND SUPPLIERS DISCUSS PRICING. THAT'S PART AND
10 PARCEL OF THE RELATIONSHIP, SO THERE'S NOTHING TO BE INFERRED
11 THERE.

12 THE PLAINTIFFS -- AND -- AND MR. FRIEDMAN SEEMED TO BE
13 USING THE WORD "HOLISTIC" AS THOUGH HE'S DISTANCING HIMSELF
14 FROM IT. I THINK THAT IT'S UNEQUIVOCALLY THE STANDARD HERE,
15 THE HOLISTIC READING. THE "HOLISTIC" PART, WHICH THE -- WHICH
16 THE PLAINTIFFS OFTEN CHIME -- CHIME ABOUT IN ORDER TO PROTECT
17 THEIR PLEADINGS, THAT CAN BE TURNED AGAINST THEM.

18 THE HOLISTIC READING OFTEN GIVES THEM SHELTER, BUT
19 SOMETIMES IT UNDERMINES THEIR ALLEGATIONS, AND I SUBMIT THAT'S
20 WHAT'S HAPPENING HERE.

21 THE OTHER POINT WE RAISE IN OUR MOTION TO DISMISS WAS
22 TOUCHED UPON DURING THE HITACHI ARGUMENT, YOUR HONOR, BUT I
23 THINK IT NEEDS TO BE CLARIFIED A LITTLE BIT.

24 IN -- OUR ARGUMENT HERE IS THAT THE COMPLAINT -- AND THIS
25 ONE ONLY DEALS WITH THE DIRECT PURCHASER COMPLAINT BECAUSE

1 IT'S AN ILLINOIS BRICK ISSUE. THE DIRECT PURCHASER COMPLAINT
2 CONTAINS NO ALLEGATIONS ABOUT ANY COMPANY BEING OWNED OR
3 CONTROLLED BY TOSHIBA. OKAY. SO THE -- THE QUESTION IS WHAT
4 ARE THE LEGAL IMPLICATIONS OF THAT ABSENCE. AND BY THE WAY, I
5 DON'T THINK THE DPP'S QUARREL WITH THAT CHARACTERIZATION.

6 FIRST OF ALL, I THINK IT'S EMPIRICALLY PROVABLE. AND
7 SECONDLY, THE CHART THAT THE DPP'S ATTACH TO THEIR JOINT
8 MOTION OPPOSITION CATALOGS ALL OF THEIR ALLEGATIONS OF
9 OWNERSHIP OR CONTROL. AND YOU'LL NOTICE THE CONSPICUOUS
10 ABSENCE OF ANY REFERENCE TO TOSHIBA THERE.

11 SO, FIRST OF ALL, I THINK IT'S INDISPUTABLE THAT THERE'S
12 NO ALLEGATIONS ABOUT ANY COMPANY BEING OWNED OR CONTROLLED BY
13 TOSHIBA. THE REAL ISSUE IS WHAT ARE THE LEGAL IMPLICATIONS
14 FROM THAT. AND MR. SIMON, WHO CAME UP BEFORE TO ADDRESS THIS
15 POINT, PREFACED HIS COMMENTS BY SAYING, I DON'T EVEN
16 UNDERSTAND THIS POINT. I DON'T KNOW WHY THEY'RE MAKING IT. I
17 AGREE WITH HIM, HE DOESN'T UNDERSTAND THE POINT, BECAUSE HE --
18 HE READ THAT AS AN EFFORT ON THE PART OF THE DEFENDANTS TO BE
19 DISMISSED ENTIRELY BECAUSE OF THE ABSENCE OF SUCH ALLEGATIONS.
20 THAT IS NOT THE CASE.

21 WE RECOGNIZE WE CAN STILL BE KEPT IN THE CASE FOR
22 JOINT-AND-SEVERAL LIABILITY, BUT -- BUT, YOUR HONOR -- AND
23 THIS IS IMPORTANT -- IF -- IF THERE'S NO ENTITY OWNED OR
24 CONTROLLED BY TOSHIBA, THAT MEANS THAT THE PRODUCTS SOLD BY
25 TOSHIBA CANNOT RESULT IN A DIRECT PURCHASE BY THE DIRECT

1 PURCHASER CLASS. THEY HAVE NO BASIS FOR CLAIMING TO BE A
2 DIRECT PURCHASER OF TOSHIBA, CELLS, BATTERIES, OR PRODUCTS.

3 SO ALL WE'RE SAYING IS THE ABSENCE OF THOSE ALLEGATIONS
4 MEANS THAT TOSHIBA'S TRANSACTION, ITS COMMERCE IS OUT OF THE
5 CASE. AND THAT'S IMPORTANT HERE, PARTICULARLY FOR TOSHIBA,
6 BECAUSE WE ARE ONE OF THE BIGGEST LAPTOP SELLERS IN THE
7 RELEVANT PERIOD. HUGE COMMERCE. THAT COMMERCE DOES NOT
8 BELONG IN THE DPP CASE BECAUSE OF THE ABSENCE OF THOSE
9 OWNERSHIP OR CONTROL ALLEGATIONS.

10 **MR. SIMON:** YOUR HONOR, BRIEFLY, I HAVE THE HIGHEST
11 RESPECT FOR MR. CURRAN, AND WHEN HE SAYS I DON'T UNDERSTAND
12 SOMETHING, I -- THAT'S BELOW THE STANDARD I USUALLY EXPECT OF
13 HIM.

14 I'LL READ FROM THERE THREE THINGS, AND I WON'T EVEN ARGUE
15 BECAUSE THEY SPEAK FOR THEMSELVES. FROM THEIR REPLY BRIEF,
16 THE NINTH CIRCUIT CONCLUDED THAT ROYAL PRINTING COULD PROCEED
17 AS A DIRECT PURCHASER ON THE TRANSACTIONS IT MADE WITH THE
18 SUBSIDIARY AND A DIVISION OF TWO OF THE DEFENDANT
19 MANUFACTURERS, MR. CURRAN'S WORDS IN HIS REPLY BRIEF.

20 JUDGE ILLSTON ON ROYAL PRINTING, ROYAL PRINTING WAS NOT
21 CONCERNED WITH THE RELATIONSHIP BETWEEN THE MANUFACTURER OF
22 THE PRICE-FIXED PRODUCT AND THE DIRECT PURCHASER. RATHER, IT
23 WAS CONCERNED WITH THE RELATIONSHIP BETWEEN THE CONSPIRATOR
24 AND THE DIRECT PURCHASER. INDEED, THE FACTS IN ROYAL PRINTING
25 CONFIRMED THIS. ROYAL PRINTING SOUGHT DAMAGES FOR ITS

1 PURCHASES FROM A COCONSPIRATOR'S WHOLESALING DECISION BUT HAD
2 NEVER BOUGHT ANY OF THE PARENT COMPANY'S PRODUCTS FROM THAT
3 DIVISION. IT HAD ONLY BOUGHT PRODUCTS OF THE OTHER DEFENDANT
4 MANUFACTURERS.

5 AND, LASTLY, NIPPON PAPER, WHICH SAYS AT THE END IN
6 CONCLUSION, IF NIPPON PAPER PARTICIPATED IN A CARTEL OF
7 THERMAL FAX PAPER, SOMETHING THAT REMAINS TO BE DETERMINED,
8 THEN IT IS JOINTLY AND SEVERALLY LIABLE FOR THE CARTEL'S
9 ENTIRE OVERCHARGE. THAT THE PLAINTIFFS DID NOT BUY FROM
10 NIPPON PAPER DIRECTLY OR ALL DOES NOT MATTER.

11 IN FORM OR SUBSTANCE, THAT MEANS IT DOESN'T MATTER WHAT
12 MR. CURRAN IS ARGUING. HE IS WRONG ON THE LAW AND WRONG ON
13 THE EFFECT OF ROYAL PRINTING. AND HE IS ACTUALLY ARGUING TO
14 YOU THAT ROYAL PRINTING SHOULD BE ELIMINATED. HE CAN GO ARGUE
15 THAT TO THE NINTH CIRCUIT.

16 **MR. CURRAN:** YOUR HONOR, WE'RE STILL SHIPS PASSING IN
17 THE NIGHT, AND I DON'T MEAN THAT PEJORATIVELY. AND I DIDN'T
18 MEAN THE EARLIER COMMENT PEJORATIVELY.

19 MAYBE THERE'S A GENUINE FAILURE TO JOIN ISSUE HERE. WE
20 ARE NOT CLAIMING WE GET DISMISSED BECAUSE OF THEIR ABSENCE OF
21 ALLEGATIONS.

22 (SIMULTANEOUS COLLOQUY.)

23 **MR. CURRAN:** WE ARE STILL ON THE HOOK --

24 **THE COURT:** LET ME ASK THIS QUESTION: WHAT ARE YOU
25 ASKING THE COURT TO DO WITH RESPECT TO THE EFFECT OF YOUR

1 ARGUMENT?

2 **MR. CURRAN:** WE ASK THAT YOUR HONOR ISSUE AN ORDER IN
3 TO RESPONSE TO OUR MOTION -- PUTTING ASIDE THE TWOMBLY ISSUE,
4 RIGHT, WHICH IS SEPARATE -- BUT IN RESPONSE TO THIS ISSUE,
5 YOUR HONOR SHOULD HAVE AN ORDER SAYING THAT THE -- THE DPP
6 CLASS MAY NOT CLAIM DAMAGES BASED ON SALES BY TOSHIBA BECAUSE
7 THE COMPLAINTS CONTAIN NO ALLEGATIONS THAT ANYBODY WHO SOLD
8 PRODUCT TO THE DPP'S WAS OWNED OR CONTROLLED BY TOSHIBA.

9 **MR. SIMON:** AND THAT'S JUST WRONG AS A MATTER OF LAW,
10 AND THAT'S A MOTION TO STRIKE DAMAGE CLAIMS WHICH DOESN'T
11 HAPPEN AT THE TIME OF THE PLEADINGS. THERE'S BEEN NO
12 DISCOVERY ON THIS. AND IT'S EFFECTIVELY SAYING CARVE
13 SOMETHING OUT, WHICH IS A CLASS CERT ISSUE. IT'S ALL
14 PREMATURE, ASIDE FROM BEING LEGALLY WRONG, YOUR HONOR. IT
15 JUST IS NOT A PROPER READING OF ROYAL PRINTING.

16 IF YOU DID WHAT MR. CURRAN SUGGESTS UNDER ROYAL PRINTING,
17 YOU WOULD BE EFFECTIVELY VITIATING THE EXCEPTION BECAUSE HE'S
18 TRYING TO READ SOMETHING INTO IT THAT DOESN'T EXIST IN THAT
19 CASE.

20 **THE COURT:** LET ME ASK PROCEDURALLY, IS IT
21 APPROPRIATE TO -- TO BE ASKING FOR THAT ORDER UNDER A 12(B)(6)
22 MOTION?

23 **MR. CURRAN:** I THINK IT IS, YOUR HONOR. I MEAN --

24 **THE COURT:** HOW IS IT? IT'S NOT FAILURE TO STATE A
25 CLAIM.

1 **MR. CURRAN:** I THINK IT IS A CLAIM. I THINK IT'S
2 FAILURE TO STATE A CLAIM. IT'S -- IT'S NOT A COMPLETE
3 DISMISSAL BASED ON STANDING, BUT IT -- IT'S A STANDING ISSUE.
4 WHETHER YOU WANT TO CALL THAT 12(B)(6) OR 12(B)(1), YOU KNOW,
5 IT'S -- THE DPP'S DO NOT HAVE STANDING TO -- TO CLAIM THOSE
6 DAMAGES. AND IF THEY ARE CLAIMING THOSE DAMAGES, I SUBMIT
7 THEN WE'VE GOT A DUPLICATIVE DAMAGES ISSUE BECAUSE THE IPP --
8 THOSE CLAIMS BELONG IN THE IPP CASE.

9 AND THIS KIND OF THING HAS TO BE SORTED OUT EARLY;
10 OTHERWISE, IT'S GOING TO COMPLICATE THINGS AT THE CLASS CERT
11 STAGE AND AT THE EXPERT STAGE. AND THERE HAS TO BE CLARITY AS
12 TO WHAT IS IN THE CASE, AS TO WHO IS A RELEVANT WITNESS FOR
13 DEPOSITIONS AND OTHER THINGS.

14 **MR. SIMON:** WE DISAGREE, YOUR HONOR. IT'S --

15 **THE COURT:** LET ME ASK --

16 **MR. SIMON:** -- MOTION TO STRIKE.

17 **THE COURT:** WELL, I THINK PROCEDURALLY, IT MAY NOT BE
18 PROPER, BUT I DON'T HAVE A PERSPECTIVE ON WHETHER OR NOT IT'S
19 ACCURATE IN TERMS OF LAW YET.

20 **MR. CURRAN:** YEAH. AND, YOUR HONOR --

21 **THE COURT:** LET ME -- LET ME ASK THIS. YOU RAISE AN
22 ISSUE THAT NO ONE HAS REALLY ADDRESSED YET, AND THAT IS --
23 MAYBE IT REALLY JUST GOES BACK TO THE ARGUMENT FROM MAY.

24 THE ISSUE OF DUPLICITY IN TERMS OF THE FIVE-FACTOR TEST
25 THAT THE COURT WILL HAVE TO GO THROUGH -- AND I DON'T KNOW IF

1 ANYONE WANTS TO SAY ANYTHING WITH RESPECT TO THAT GLOBALLY OR
2 NOT -- ONE OF THE REASONS AN ORDER HAS NOT ISSUED WITH RESPECT
3 TO THE FIRST CONSOLIDATED COMPLAINT IS I WANT TO MAKE SURE
4 THAT I'M DOING ALL OF THESE AT ONCE SO THAT IT DOES MAKE
5 SENSE.

6 **MR. SIMON:** WHICH FACTOR ARE YOU -- DID YOU WANT
7 TO --

8 **THE COURT:** WITH RESPECT TO --

9 **MR. SIMON:** IF THERE'S DUPLICATION?

10 **THE COURT:** DUPLICATION --

11 **MR. SIMON:** THERE IS NONE. THERE'S NO OVERLAP
12 BETWEEN THE DIRECT PURCHASER CLASS AND THE INDIRECT, AS
13 DEFINED INTERPRETED PROPERLY UNDER THE LAW. WE GAVE YOU A
14 SLIDE ON THAT IN OUR PACKET.

15 **THE COURT:** WHICH PAGE IS THAT?

16 **MR. SIMON:** IN FACT, WE SHOW YOU --

17 **MR. KESSLER:** ACTUALLY, YOUR HONOR, WE DO --

18 **MR. SIMON:** EXCUSE ME, SIR.

19 **THE COURT:** HOLD ON, MR. KESSLER.

20 **MR. KESSLER:** SORRY.

21 **THE COURT:** WHAT PAGE, MR. SIMON?

22 **MR. SIMON:** IT'S PAGE 24 AND PAGE 25. THE IPP'S
23 BOUGHT THROUGH INTERMEDIARIES AND WE SHOW YOU A STORE FRONT
24 LIKE COSTCO -- THAT'S WHO THEY BOUGHT THROUGH. AND WHEN WE
25 BOUGHT THROUGH A STORE FRONT, IT WAS A SONY STORE FRONT, FOR

1 EXAMPLE, AND WE BOUGHT DIRECTLY.

2 THERE'S NO OVERLAP. THERE'S NO DUPLICATION OF EFFORT.
3 THERE'S NO DUPLICATION OF DAMAGES. YOU KNOW, IN LCD, WHICH
4 MR. CURRAN WAS IN, THERE WAS A CONVERSATION ABOUT THIS AFTER
5 CLASS CERTIFICATION.

6 CERTAIN CLASS MEMBERS MAY OVERLAP 'CAUSE THEY MIGHT HAVE
7 DIRECT AND INDIRECT, BUT PURCHASES NEVER OVERLAP. THEY'RE
8 EITHER DIRECT OR INDIRECT. AND IF THERE'S ANY SORT OF
9 AMBIGUITY ABOUT THAT AFTER CLASS IS CERTIFIED, IT IS HANDLED
10 AS IT WAS IN LCD, AS A CLAIMS ADMINISTRATION ISSUE, AND NOBODY
11 IN LCD GOT PAID TWICE FOR BEING DIRECT AND INDIRECT. IT JUST
12 DOESN'T HAPPEN. IT'S NOT THE WAY IT PROCEEDS. SO I -- I
13 THINK IT'S SOMETHING THAT JUST -- IT IS A RED HERRING.

14 NO. 2 IS UNDER ROYAL PRINTING, OF COURSE, THE LAW IS WE
15 GET 100 PERCENT OF THE OVERCHARGE BECAUSE ROYAL PRINTING
16 DIDN'T WANT TO GO THROUGH ANY SORT OF APPORTIONMENT AND SAID
17 IT WOULD BE BETTER TO -- TO GIVE A HUNDRED PERCENT OF
18 OVERCHARGE THAN TO ELIMINATE THIS GROUP OF PLAINTIFFS THAT WE
19 REPRESENT COMPLETELY.

20 SO I THINK IT'S A RED HERRING. AND I THINK THAT
21 MR. CURRAN AND MR. KESSLER, TO THE EXTENT THEY ARGUE IT, ARE
22 WRONG ON THE LAW AGAIN.

23 **MR. KESSLER:** YOUR HONOR, WE DO DISAGREE THAT THERE'S
24 NOT AN OVERLAP, AND I'LL EXPLAIN WHY. IT HAS TO DO WITH THE
25 CONSUMERS WHO THEY'RE CLAIMING ARE DIRECT PURCHASERS WHO

1 PURCHASED A BATTERY, FOR EXAMPLE.

2 THAT CONSUMER IS ALSO IN THE IPP CLASS DEFINITION. HE'S
3 TRYING TO SAY THEY'RE NOT BECAUSE THE IPP CLASS DEFINITION
4 USES THE WORD "INDIRECT." BUT, IN FACT, YOUR HONOR, THIS IS
5 BACK TO WHERE WE STARTED OUR ARGUMENT THIS MORNING.

6 HIS CALLING THEM DIRECT IS JUST SAYING, WELL, HE THINKS
7 THEY HAVE ILLINOIS BRICK STANDING. SO HE'S CALLING THEM
8 DIRECT. AS YOUR HONOR AND THE COURTS HAVE RECOGNIZED, THEY'RE
9 THE SAME INDIRECT PURCHASERS BECAUSE THEY'RE NOT BUYING THE
10 CELLS DIRECTLY. SO I AM QUITE CONFIDENT THAT CONSUMER IS IN
11 BOTH CLASSES AND WILL TO BE SORTED OUT AT SOME TIME ABOUT
12 THAT.

13 **MR. CURRAN:** AND, YOUR HONOR, IF I CAN TIE THIS INTO
14 THE TOSHIBA THING, MR. SIMON, I THINK, SAID 24, BUT I THINK
15 YOU MEANT 25, RIGHT? SLIDE 25?

16 **MR. SIMON:** I SAID 24 AND 25.

17 **MR. CURRAN:** OKAY. 25 ILLUSTRATES THE POINT I'M
18 TRYING TO MAKE, YOUR HONOR. TOSHIBA IS ON THE RIGHT SIDE
19 BECAUSE THE DPP COMPLAINT SAYS NOTHING ABOUT THE DPP'S
20 PURCHASING FROM ANYONE OWNED OR CONTROLLED BY TOSHIBA. SO
21 IF -- IF THERE WERE -- IF THERE WERE SUCH ALLEGATIONS, WE'D BE
22 ON THE LEFT SIDE, LIKE SONY IS HERE. BUT BECAUSE THERE ARE NO
23 SUCH ALLEGATIONS, WE'RE ON THE RIGHT SIDE. THE -- OUR --
24 OUR -- OUR COMMERCE BELONGS IN THE INDIRECT CASE, NOT IN THE
25 DIRECT CASE. THIS ILLUSTRATES IT.

1 **MR. SIMON:** THIS -- WE'RE GOING BACK OVER THINGS.

2 I'M JUST GOING TO SAY ONE THING. THE ISSUE BEFORE YOUR HONOR
3 ON STANDING IS THE CLASS REPRESENTATIVES. AND AS I JUST READ
4 IN NIPPON PAPER AND AS IS THE LAW IN THIS DISTRICT, YOU DON'T
5 HAVE TO HAVE A PLAINTIFF WHO BOUGHT FROM EVERY DEFENDANT.
6 THAT -- IT HASN'T BEEN THE WAY IN 34 YEARS THAT I'VE BEEN
7 DOING THESE ANTITRUST CASES. YOU HAVE A NUMBER OF PLAINTIFFS
8 WHO BOUGHT FROM CERTAIN DEFENDANTS, AND IF THEY'RE IN A
9 CONSPIRACY, THEY'RE IN THE CASE. MR. CURRAN AND MR. KESSLER
10 ARE TRYING TO CARVE OUT SOMETHING THAT IS WRONG AS A MATTER OF
11 LAW.

12 AND WE WILL STAND ON THE LAW AND OUR PRESENTATION OF THE
13 LAW. TO SAY WHAT HE'S SAYING -- HE MIGHT SAY IT TO THE NINTH
14 CIRCUIT SOME DAY, WHO KNOWS, AND THAT'S WHAT THEY (SIC) BEEN
15 TRYING TO DO IN THESE CASES UP TILL NOW, IS CREATE THIS ROYAL
16 PRINTING ISSUE. BUT AS THE LAW STANDS TODAY, HE IS NOT RIGHT
17 ON THE LAW.

18 **MR. CURRAN:** WE'RE SHIPS PASSING IN THE NIGHT BECAUSE
19 I'M NOT QUARRELING WITH THE LAW.

20 **THE COURT:** WELL, YOU'VE SAID THAT THREE TIMES. ALL
21 RIGHT.

22 ANYTHING ELSE?

23 **MR. CURRAN:** THANK YOU FOR YOUR PATIENCE, YOUR HONOR.

24 **MR. SIMON:** THANK YOU, YOUR HONOR.

25 **MR. KESSLER:** THANK YOU VERY MUCH, YOUR HONOR.

1 **THE COURT:** OKAY.

2 **MR. SIMON:** CASE MANAGEMENT AT ALL OR --

3 **THE COURT:** YEAH, I THINK -- I THINK SO. ONE -- I DO
4 WANT TO THANK YOU ALL FOR A COUPLE OF THINGS. ONE, FOR
5 GETTING ME THE REVISED COMPLAINT WITH TRACKED CHANGES THAT WAS
6 VERY HELPFUL; FOR COMBINING THE BRIEFS, VERY HELPFUL; SO I
7 APPRECIATE THAT, THAT EXTRA AMOUNT OF EFFORT.

8 **MR. SIMON:** CAN WE ON THE DIRECT SIDE GIVE A
9 SHOUT-OUT TO LIAISON COUNSEL, BOTH OF WHOM WERE INSTRUMENTAL
10 IN PUTTING THAT TOGETHER FOR YOUR HONOR WITH THE HELP OF A LOT
11 OF PEOPLE, SO THEY DESERVE A LOT OF CREDIT.

12 **THE COURT:** WELL, I APPRECIATE IT, 'CAUSE IT DID
13 MAKE -- IT DID STREAMLINE IT. AND I -- I THINK THE OTHER
14 THING THAT HAPPENS AND I MENTIONED THIS BEFORE IS THAT
15 SOMETIMES ATTORNEYS DO TALK PAST EACH OTHER. AND BY HAVING TO
16 CREATE A COMBINED BRIEF, YOU'RE KIND OF FORCED TO MAKE SURE
17 THAT YOU'VE ADDRESSED ARGUMENTS.

18 OKAY. I START A LONG PATENT TRIAL AT THE END OF THE
19 MONTH. SO IF I DON'T HAVE ORDERS OUT BEFORE THEN, THEN YOU'RE
20 GOING TO JUST HAVE TO WAIT BECAUSE THAT PATENT TRIAL WILL TAKE
21 UP SIGNIFICANT AMOUNT OF TIME.

22 ANY ISSUES YOU WANT TO RAISE? START WITH YOU, MR. SIMON.

23 **MR. SIMON:** I THINK THE NEXT STEP IS TO GET YOUR
24 HONOR'S ORDERS AND THEN TO HAVE A STATUS CONFERENCE SHORTLY
25 THEREAFTER. AND THEN WE CAN RAISE ANY ISSUES THEN. IN THE

1 MEANTIME, DISCOVERY CAN PROCEED WITH THE MAGISTRATE JUDGE.

2 **THE COURT:** THAT WAS MY THOUGHT.

3 MR. KESSLER, DO YOU WANT TO SPEAK FOR THE DEFENDANTS?

4 **MR. KESSLER:** YEAH, WE DON'T HAVE ANY PENDING ISSUE,
5 YOUR HONOR. WE'LL WAIT TO READ YOUR HONOR'S OPINIONS, AND WE
6 ARE PROCEEDING WITH THE MAGISTRATE ON THE ISSUES THAT YOUR
7 HONOR CERTIFIED SHOULD GO FORWARD BEFORE THE MAGISTRATE.

8 **THE COURT:** COUNSEL?

9 **MR. WILLIAMS:** GOOD AFTERNOON. STEVE WILLIAMS. JUST
10 BRIEFLY, WE'RE GOING BACK TO SEE MAGISTRATE JUDGE RYU IN
11 MID-SEPTEMBER. SHE'S CARVED OUT FOUR ISSUES FOR US TO WORK ON
12 WITH DEFENDANTS. AND WE'RE GOING TO REPORT BACK TO HER, AND I
13 THINK THAT WILL BE THE NEXT TIME WE'RE IN COURT SEEKING ANY
14 SORT OF PROCEDURAL THINGS.

15 **THE COURT:** OKAY. SO IT SOUNDS LIKE NOTHING ELSE,
16 THEN, TO DEAL WITH?

17 EVERYBODY ENJOY THE REST OF YOUR SUMMER. IT IS QUICKLY
18 COMING TO A CLOSE. IT HAS COME TO CLOSE ALREADY FOR ME,
19 BUT --

20 **MR. SIMON:** SCHOOL NEXT WEEK.

21 **MR. KESSLER:** THANK YOU, YOUR HONOR.


22 (PROCEEDINGS WERE CONCLUDED AT 12:07 P.M.)

23 --000--

CERTIFICATE OF REPORTER

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR, RELATED TO,
NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN WHICH THIS
HEARING WAS TAKEN, AND FURTHER THAT I AM NOT FINANCIALLY NOR
OTHERWISE INTERESTED IN THE OUTCOME OF THE ACTION.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR

THURSDAY, AUGUST 14, 2014